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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-367

FORD MOTOR COMPANY, a corporation,

Petitioner,

v.

EDWARD C. REA and 22 FORD, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Ford Motor Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 6, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit following a retrial of the damage phase of the Automobile Dealers' Act claim is reported at ____ F.2d ____, Nos. 76-1982 and 76-1983 (3d Cir. July 6, 1976) (Appendix A, pp. 1a-12a). The earlier opinion of the Court of Appeals which, *inter alia*, remanded for retrial a redetermination of

damages under the Automobile Dealers' Act is reported at 497 F.2d 577 (3d Cir. 1974) (Appendix B, pp. 13a-41a).[1] The opinion of the District Court after the retrial is reported at 406 F.Supp 271 (W.D. Pa. 1975) (Appendix C, pp. 42a-62a).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated, and was entered, on July 6, 1977. A Petition for Rehearing In Banc filed by petitioner was denied by order dated August 2, 1977. There has been no request for an extension of time within which to petition for certiorari.

Jurisdiction for this Court to review by writ of certiorari the judgment of the Court of Appeals is conferred by the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Automobile Dealers' Act (15 U.S.C. §1221, *et seq.*) may be construed to give a cause of action to a shareholder-officer as a "dealer" where the franchise is with the corporate dealer and, if so, whether he may personally recover both corporate profits and his salary and bonus as damages under the Act?

2. Whether an affirmance of liability under a federal statute where the "fact of damage" is an element of liability and where damages are claimed for lost profits precludes a defendant, upon remand for a redetermination of damages, from challenging whether the plaintiff's business could have been continued for the particular period for which lost profits are claimed?

3. Whether the circumstances presented by a new and different claim being suggested by a trial court at a jury trial after the conclusion of plaintiffs' case without defendant

[1]That portion which deals with the Automobile Dealers' Act claim is at 497 F.2d at pp. 582-87 (Appendix B, pp. 18a-27a).

having any prior notice of that claim or opportunity for discovery and defense as to that claim and the subsequent refusal at a retrial for a redetermination of damages to permit a defendant to offer evidence that the business could not have been continued for the period for which lost profits were claimed, taken in their totality, constitute a denial of due process which calls for an exercise of this Court's power of supervision?

STATUTE INVOLVED

The statute involved is the Automobile Dealers' Act, 15 U.S.C. §1221, *et seq.*, which states in pertinent part at 15 U.S.C. §1221(c):

> "'The term 'automobile dealer' shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons."

STATEMENT OF THE CASE

Edward C. Rea ("Mr. Rea") is an officer and stockholder of 22 Ford, Inc. ("22 Ford"). Mr. Rea and 22 Ford commenced this lawsuit as co-plaintiffs against petitioner, Ford Motor Company ("Ford"), alleging in their complaint a variety of claims based, *inter alia*, upon breach of contract, Sections 1 and 2 of the Sherman Act, the Robinson-Patman Act, Section 3 of the Clayton Act and also the Automobile Dealers' Act. Only the Automobile Dealers' Act claim remains at issue.[2]

From the filing of the complaint in 1967 through the presentation of plaintiffs' evidence at the first trial in 1972, the Automobile Dealers' Act claim was being asserted on behalf of the corporate plaintiff, 22 Ford, on the theory that Ford's refusal to enter into a particular real estate transaction and competition with 22 Ford by company-owned dealerships constituted a violation of that Act.[3] However, at the close of plaintiffs' case at the original trial, the trial court suggested *sua sponte* a new and different claim under the Automobile Dealers' Act. This claim was based on an alleged oral threat to stop shipping Ford automobiles unless Mr. Rea caused another dealership owned by him (then Rea Olds, Inc.) to resign its franchise with a different manufacturer, Oldsmobile. (See 497 F.2d at 582 (Appendix B, p. 18a)).

The termination of the Oldsmobile franchise had been pleaded only in terms of a possible violation of Section 3 of the Clayton Act. In that context the termination constituted no real claim since it was undisputed that there had been no

[2]In the course of this litigation all of plaintiffs' other claims have been either rejected at various stages of the litigation or have been abandoned by plaintiffs.

[3]There was no basis for the Automobile Dealers' Act claim as originally alleged. The trial court directed a verdict for Ford on these claims at the close of plaintiffs' case.

lessening of competition.[4] However, at the lower court's *sua sponte* suggestion after plaintiffs had rested their case, this termination was presented to the jury as a possible Automobile Dealers' Act violation against 22 Ford. Ford's hurried defense was of necessity limited to calling its own personnel in an attempt to demonstrate its good faith and that no "threat" was ever made, albeit Ford had been legitimately concerned as to the adequacy of capital available to the Ford dealership. Mr. Rea had admittedly advised Ford that a substantial portion of the capital for the Ford dealership was to come from his investment in the Oldsmobile dealership. The jury returned a verdict in the amount of $350,000 under the Automobile Dealers' Act in favor of 22 Ford, even though 22 Ford was not even a dealer of Ford at the time of the alleged threat.[5] Furthermore, the damages awarded under the Automobile Dealers' Act were alleged lost corporate profits of the terminated Oldsmobile dealership owned by Mr. Rea, which later changed its corporate name to 22 Ford, the present corporate plaintiff.

On appeal from the first trial, Ford asserted that the trial court's suggestion late into the trial of a new Automobile Dealers' Act claim deprived Ford of its right to prepare a defense. This position focused on Ford's not having been afforded any real opportunity to establish a lack of causation for lost profits by virtue of the objective necessity to liquidate the Oldsmobile dealership. Ford's position was that this liquidation was necessary in order to raise the

[4]It was admitted that immediately after Rea Olds, Inc. resigned its Oldsmobile franchise a new Oldsmobile dealership continued to operate at the same location. Accordingly, there was no basis for a cause of action under the Clayton Act.

[5]The threat was alleged to have been made prior to August 31, 1964 at which time the Ford dealership was being operated by Edward C. Rea, Inc. as Ford's franchisee. Subsequently, Edward C. Rea, Inc. assigned its Ford franchise to the corporate plaintiff, 22 Ford. See 497 F.2d at 582-83 (Appendix B, pp. 19a-20a).

additional capital required when the Ford dealership moved to its permanent facilities three months after Rea Olds, Inc. was terminated. The Court of Appeals seemed to agree, stating:

> "Finally, Ford argues that the introduction of a new theory of liability at the close of the plaintiffs' case prejudiced Ford in its defense to the Dealers' Act claim. . . . It is possible that with more advance notice, Ford could have adduced further evidence to establish with greater certainty the objective necessity for Rea Olds' liquidation of its franchise." 497 F.2d at 586-87 (Appendix B, pp. 25a-26a).

The Court of Appeals went on to vacate the award under the Automobile Dealers' Act as being "excessive"[6] and, although affirming liability in a "close case"[7] ordered a redetermination of damages.

At the non-jury retrial plaintiffs asserted that lost profits of the terminated Oldsmobile franchise were recoverable by 22 Ford under the Automobile Dealers' Act for a ten-year period.[8] Believing that all issues of causation were still open for redetermination and that only the jury's finding of a lack of good faith was affirmed on the first appeal, Ford offered a two-pronged argument on causation. First, it argued that the facts would show that Ford's actions were not the proximate cause of the termination of Rea Olds, Inc. because that termination would have occurred regardless of Ford's actions. Secondly, Ford argued that even if its actions could be found to have been the proximate cause of the termination of Rea Olds, Inc., this fact would not support a

[6]497 F.2d at 587 (Appendix B, p. 26a).

[7]497 F.2d at 583 (Appendix B, p. 20a).

[8]This was two years longer than the period used to measure the damages found to be "excessive" by the Court of Appeals in the first appeal. See 497 F.2d at 587 (Appendix B, p. 26a).

finding that Ford had caused Rea Olds, Inc. to lose profits during the entire ten-year period claimed by plaintiffs. Rather, Ford's evidence supported a finding that Rea Olds, Inc. would have to have been liquidated in a short time in any event.[9] The trial court refused to admit any such evidence by ruling:

> "Whether this evidence comes in under the label of 'proximate cause of damages' or under an attempt to retry liability, it is the holding of the court that it is inadmissible." 406 F.Supp. at 278-79 (Appendix C, p. 55a).

The trial court recognized at the retrial that the corporate plaintiff, 22 Ford, could not recover based on the alleged "threat" and termination of the Oldsmobile dealership since 22 Ford had not been a dealer of Ford at the time of the alleged "threat." Damages under the Automobile Dealers' Act were awarded to Mr. Rea, however, in the form of lost corporate profits of Rea Olds, Inc. plus Mr. Rea's lost salary and bonuses. See 406 F.Supp. at 276-81 (Appendix C, pp. 50a-61a).

On appeal from the retrial, the July 6, 1977 majority opinion of the Court of Appeals affirmed the award under

[9]While Mr. Rea admittedly was able to operate both the Ford franchise in a temporary facility and Rea Olds, Inc. for a period of approximately six months, both documentary evidence and testimony of the bank officer demonstrated that when the permanent Ford facilities were ready in December of 1964, a substantial increase in capitalization was needed. Ford's evidence supported the conclusion that there was not sufficient capital to continue the operation of both dealerships after that time. In fact, even after adding the assets of Rea Olds, Inc. to the Ford dealership's capitalization 22 Ford immediately commenced a practice of seeking capital loans for its continued operation. The first such loan was obtained within one month after the Ford dealership moved into its permanent facilities and within a year thereafter, a substantial additional capital loan was needed. The bank officer testified that this January 1966 loan would not have been approved if Rea Olds, Inc. had not been liquidated by that time.

the Automobile Dealers' Act to Mr. Rea as a stockholder and officer by stating:

> "The corporate entity that suffered harm was the Oldsmobile franchise, which ceased to exist; the 'dealer' for purposes of the action under the Auto Dealers' Act was Edward Rea in his capacity as a *Ford* dealer. In that capacity, he personally suffered damage not only through loss of income as a shareholder of the Oldsmobile business Ford forced him to close, but also through loss of the salary and bonuses he could have earned in that business." ___ F.2d ___, Nos. 76-1982 and 76-1983 (3d Cir. July 6, 1977) (Appendix A, p. 4a) (Citations and footnotes omitted).[10]

As to the lower court's refusal to admit Ford's evidence offered to rebut causation for the period of lost profits claimed, the July 6, 1977 Court of Appeals decision held:

> "Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage." ___ F.2d ___ Nos. 76-1982 and 76-1983 (3d Cir. July 6, 1977) (Appendix A, p. 4a).

After a denial of Ford's Petition for Rehearing In Banc by order dated August 2, 1977, Ford filed this Petition.

Basis For District Court Jurisdiction

As indicated above, the claims at issue are made under the Automobile Dealers' Act, 15 U.S.C. §1221 *et seq.* Accordingly, the basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1331.

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[10]Rea Olds, Inc. had never paid any dividends to Mr. Rea as a shareholder. Similarly, 22 Ford never paid any dividends to Mr. Rea. Thus, his only income from the automobile dealer franchises in which he has been an officer-stockholder has been in the form of salaries and bonuses. Plaintiffs' position has always been that 22 Ford should recover all damages.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER

In holding that Mr. Rea could recover lost corporate profits as a "dealer" of Ford under the Automobile Dealers' Act even though the dealership was conducting business in corporate form, the Third Circuit rendered a decision directly in conflict with the Second Circuit decision of *Vincel v. White Motor Corporation*, 521 F.2d 1113 (2d Cir. 1975). In *Vincel*, the Second Circuit affirmed the dismissal of the owner-plaintiffs' claim under the Automobile Dealers' Act by holding:

> "The statutory claims of the plaintiffs must also fail because any such claims belong to the corporation. A stockholder may not bring an action in his own right for anti-trust violations causing corporate injury. The Automobile Dealers' Franchise Act, 15 U.S.C. §§ 1221-25, gives 'automobile dealer[s]' a right of action to redress unfair actions committed by a manufacturer in connection with a franchise agreement. The term 'automobile dealer' is defined as 'any person, partnership, corporation, association, or other form of business enterprise ... operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.' 15 U.S.C. § 1221(c). ***When, as here, a dealership is doing business in corporate form, the statute contains no hint that it intends a departure from the established principle that the locus of the right of action is the corporation.*** *Id.* at 1119-20 (Emphasis added) (Citations omitted).

Thus, as is evident from a reading of the statute and as pointed out by the Second Circuit in *Vincel*, the Third Circuit's holding is directly contrary to the definition of a

"dealer" in the Act. The Act creates a cause of action only in a "dealer" that fits within its definition and does not permit suit by an officer-shareholder of a corporate franchisee.

This conflict between the Third Circuit and the Second Circuit rule quoted above in *Vincel* was expressly recognized by Judge Gibbons' dissenting opinion in the July 6, 1977 decision in this case. Judge Gibbons cited and quoted from *Vincel* in support of his statement that:

> "I would not hold, as the majority has done, that the dealer's representations . . . can be relied upon to confer on the managers a statutory cause of action belonging solely to the automobile dealer. As the Second Circuit said in *Vincel* [quoting that portion quoted above] . . . ." ___ F.2d ___, Nos. 1982 and 1983 (3d Cir. July 6, 1977) (Appendix A, p. 9a).

Furthermore, the Court of Appeals here not only found Mr. Rea to be a "dealer" of Ford notwithstanding the dealership's doing business in a corporate form, but it also allowed Mr. Rea to recover damages consisting of lost *corporate* profits in addition to his lost salary and bonus. Such a double recovery of personal and corporate losses by an officer-shareholder is unprecedented and contrary to fundamental principles of law. In fact, we know of no other case which has allowed an officer-stockholder to personally recover the lost profits of a corporation. All of the cases of which we are aware have uniformly held that, except in certain derivative actions, an officer-shareholder has no standing to recover both his lost salary and bonus and lost corporate profits. See, for example, *Cromar Co. v. Nuclear Materials and Equipment Corp.* 543 F.2d 501 (3d Cir. 1976); and *Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3d Cir.), *cert denied*, 426 U.S. 935 (1976).

The resulting "hopeless muddle" as described in Judge Gibbons' dissenting opinion is that Mr. Rea was found entitled under the Automobile Dealers' Act to recover from Ford not only his alleged damages but also lost corporate profits which were the alleged damages of an *Oldsmobile* dealership.[11] Thus, the Third Circuit's opinion is not only in conflict with the Second Circuit's opinion in *Vincel* but also is in conflict with opinions in other Circuits. See *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963); *Martens v. Barrett*, 245 F.2d 844 (5th Cir. 1957); and *Former Stockholders of Barr Rubber Products Co. v. McNeil Corp.*, 325 F.Supp. 917 (N.D. Ohio 1970), *aff'd*, 441 F.2d 1169 (6th Cir. 1971).

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[11]That Mr. Rea might personally recover damages "suffered by Rea Olds" was suggested by the 1974 opinion of the Court of Appeals (497 F.2d at 584, Appendix B, p. 22a). For the purposes of retrial, Ford considered itself bound by this holding as the "law of the case" and, therefore, was not in a position to challenge the same until now. That holding by the Court of Appeals in 1974 is now subject to review by this Court. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365, fn. 1 (1973) and *Mercer v. Theriot*, 377 U.S. 152 (1964).

II. THE COURT OF APPEALS' DECISION HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In deciding that the earlier affirmance of liability under the Automobile Dealers' Act precluded Ford from contesting at retrial causation of lost profits for the entire period claimed as damages, the Court of Appeals has decided the important question of whether the "fact of damage" includes all elements of causation for damages.

This Court's decision in *Story Parchment Co. v. Paterson*, 282 U.S. 555 (1931), recognized a "distinction between the measure of proof necessary to establish the fact . . . [of] some damage, and the measure of proof necessary . . . to fix the amount." *Id.* at 562. However, the Court of Appeals' decision has here decided that a determination of the "fact of damage" made in affirming liability under the Automobile Dealers' Act precluded Ford from challenging at retrial plaintiffs' evidence that profits would have been earned during the entire period claimed.[12]

Ford offered evidence at retrial which directly challenged the ability of plaintiffs to continue the operation of both the Oldsmobile franchise and the Ford franchise during the entire period for which plaintiffs were claiming damages. Thus, even if Ford's conduct was such as to cause the termination of the Oldsmobile franchise and, therefore, establish the "fact of damage" for the purposes of liability,

[12]Ford recognizes that where a plaintiff is seeking to recover damages measured by the "going concern" value of the business terminated by reason of defendant's conduct, evidence of lost profits is used as an element fixing the value of the business at the time of its termination. In this case, plaintiffs did not utilize this measure of damages; rather, their experts assumed that both dealerships could have been operated simultaneously and, thus, claimed lost profits as the measure of the corporate damages.

that same evidence does not necessarily sustain a recovery of continued lost profits during the entire period claimed by plaintiffs.

Whether a finding of the "fact of damage" precludes a litigant from demonstrating that it could not have caused all of the damages claimed is an important federal question. For example, a litigant should be allowed to demonstrate that its conduct was not the cause of lost profits for the entire period claimed by a plaintiff. In the context of a plaintiff's burden of proof, the "fact of damage" is often a key issue in the determination of whether the plaintiff has properly established liability under the federal antitrust statutes or similar federal statutes, including the Automobile Dealers' Act.

However, in the context of a defendant's right to challenge the period used to determine the amount of lost profits recoverable, this Court has not yet stated the rule as to the significance of the "fact of damage" being determined adversely to a defendant. The Court of Appeals here ruled as follows on this important question:

> "At the outset, Ford argues that the trial court erred in refusing to allow Ford to introduce evidence tending to establish that . . . Ford's acts were not the proximate cause of any loss in profits by Rea's corporate entities. . . . We do not agree. Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage." *Id.* ___F.2d___Nos. 1982 and 1983 (3d Cir. July 6, 1977) (Appendix A, pp. 3a-4a).[13]

[13]In so ruling, the Court of Appeals stated Ford's position too narrowly. As pointed out above, Ford's position was two-fold upon retrial. First, that its actions were not the proximate cause of the termination of Rea Olds, Inc.; and second, even if Ford did cause the termination, the period of damages for which it was liable was limited to the period extending from the date of the termination to the time when it would have been necessary to liquidate Rea Olds, Inc. in order to provide the necessary capital for the full operation of the Ford dealership.

It is one matter to hold that causation and "fact of damage" are elements of a plaintiff's case on liability. It is quite another matter to decide that once a determination is made on liability adverse to a defendant, the defendant is then precluded in any subsequent proceeding on damages from challenging causation for the particular damages claimed. The Court of Appeals has here decided this latter issue in such a way that an affirmance of liability on damages vacated as "excessive" precludes any challenge of causation at retrial for new and different calculations of lost profits claimed. Since the distinction between the "fact of damage" and the measure of damage is such an important question under numerous federal regulatory statutes, including the Automobile Dealers' Act, and since the Court of Appeals' ruling would have such a serious impact upon damage calculations in such cases, we respectfully submit that this Court should grant certiorari so that it may rule upon this important question of federal law.

III. THE COURT OF APPEALS HAS SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO CONSTITUTE A DENIAL OF DUE PROCESS AND TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Ford has never been afforded an opportunity to defend the Automobile Dealers' Act claim as submitted to the jury at the first trial. Plaintiffs' complaint alleged a cause of action under the Automobile Dealers' Act based upon Ford's refusal to enter into a certain real estate transaction with plaintiffs and by competing with 22 Ford through company-owned dealerships. The Clayton Act count of plaintiffs' complaint was based solely upon a claim that Ford required the resignation of the Oldsmobile franchise as a condition to doing business under the Ford franchise. Neither plaintiffs' complaint, plaintiffs' pretrial statement nor evidence at the time of trial asserted any alleged threat by Ford as a basis for a cause of action under the Automobile Dealers' Act or the Clayton Act. In fact, no real basis for liability existed under either of these counts of plaintiffs' complaint as pleaded.[14] This fact was confirmed by the trial court's directing a verdict for Ford on the Automobile Dealers' Act claim as

[14]Up to the time that the trial judge ***sua sponte*** suggested the new and different cause of action under the Automobile Dealers' Act, there was no need for Ford to prepare any defense involving the liquidation of Rea Olds, Inc. Up to the close of plaintiffs' case, that liquidation had been presented solely as a claim under Section 3 of the Clayton Act and was not in any way asserted in the claims under the Automobile Dealers' Act. In this context, proximate cause of damages was in effect moot since liability would certainly be, and was, determined by the ***undisputed*** fact that the Oldsmobile dealership continued under new ownership without any lessening of competition. Only after the close of plaintiffs' case did Ford have reason to believe that liability might depend upon one man's word against another, thereby making the objective question of causation of Rea Olds, Inc.'s liquidation an important issue.

pleaded at the close of plaintiffs' evidence and by the jury returning a verdict in favor of Ford under the Clayton Act count.

It was not until plaintiffs had rested their case in chief that the cause of action which was ultimately submitted to the jury under the Automobile Dealers' Act was suggested *sua sponte* by the trial judge. This suggestion was based upon one sentence of Mr. Rea's testimony to the effect that Mr. McClanathan, the Ford District Sales Manager, had threatened to refuse to ship cars to the Ford franchise when it moved to its new facility unless Mr. Rea fulfilled his agreement to resign the Oldsmobile franchise and invest that capital in the Ford franchise.

At this point in the trial of a seven-count lawsuit, Ford had no opportunity to gather evidence to challenge Mr. Rea's credibility on this subject nor to challenge his assertion that he could have supplied sufficient capital to continue to operate the Oldsmobile franchise and still bring the Ford franchise up to the capital required when it moved to its new facility and commenced full operations. All Ford could do was to call Mr. McClanathan to deny ever having made any such threat to Mr. Rea. He also confirmed that the understanding between him and Mr. Rea, as supported by all of the documentary evidence in the file, showed that Mr. Rea intended to liquidate the Oldsmobile franchise as a means of supplying the capital necessary for the full operation of the Ford franchise. Thus, on this new and different claim suggested by the trial judge, the jury found that Ford had violated the Automobile Dealers' Act and awarded $350,000 damages to 22 Ford.

Both by post-trial motions and on appeal, Ford argued that it should either be granted a judgment n.o.v. on the Automobile Dealers' Act claim or at least should be granted an entire new trial. On the first appeal, the Third Circuit

affirmed liability on a "close case" but found the damages to be excessive and remanded for a redetermination of damages. In so doing, the Court of Appeals expressly found that with more advance notice, "Ford might have been able to find evidence to rebut Rea's testimony that he believed that if Rea Olds was not liquidated, he could have borrowed the required capital...", see 497 F.2d at 587, fn. 18 (Appendix B, p. 26a).

During discovery undertaken by Ford after the first trial in preparation for the retrial, Ford found precisely that evidence which the Court of Appeals expressly recognized Ford might have found if it had been given advance notice of plaintiffs' claim at the first trial. With proper notice of plaintiffs' Automobile Dealers' Act claim, Ford uncovered bank records establishing that Mr. Rea's Oldsmobile dealership would have been terminated in any event by the mid 1960's contrary to plaintiffs' claim at retrial.[15] However, for reasons stated in section II above, this evidence was held inadmissible at the retrial.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that a defendant must be "accorded

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[15] This discovery also uncovered undenied facts which would have challenged Mr. Rea's credibility. This evidence included the following: (i) Prior to filing his lawsuit, Mr. Rea filed a complaint with and appeared before Ford's Dealer Policy Board concerning the alleged refusal of Ford to enter into a certain real estate transaction. Minutes of that meeting show that Mr. Rea told the Dealer Policy Board that he always intended to liquidate his Oldsmobile franchise in order to provide the capital for the Ford franchise; (ii) Records found in the files of the bank which provided loans to Mr. Rea and members of his family for their various investments contained a memorandum in which a bank officer reported that he had been advised that 22 Ford's profits were understated because of the pending suit against Ford; and (iii) The bank lending officer who was responsible for servicing loans to 22 Ford stated clearly that he would not have recommended the capital loan to 22 Ford made in January, 1966 if Mr. Rea had not by that time terminated the Oldsmobile franchise and placed that capital in the Ford dealership.

the right to prepare [its] case and plan the strategy of trial with the knowledge that the . . . cause of action was properly before the District Court." *Id.* at 800. The Court of Appeals' initial affirmance of liability under circumstances of the claim being suggested *sua sponte* by the lower court late in the trial, combined with the Court of Appeals' later affirmance of the exclusion at retrial of Ford's evidence rebutting causation clearly contradicts the principle stated in the *McDonnell Douglas* case. In fact, the recitation above of the history of the handling of the Automobile Dealers' Act claim demonstrates without doubt that Ford never had any real opportunity to defend either a claim of liability or the issue of damages. Ford was clearly denied due process by the actions of the District Court as affirmed on two occasions by the Court of Appeals. Such conduct requires correction by this Court's power of supervision.

CONCLUSION

Petitioner respectfully requests that its Petition For a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 8, 1977

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1982 and 76-1983

EDWARD C. REA and 22 FORD INC.,
a corporation,
Appellants and Cross-Appellees

v.

FORD MOTOR COMPANY,
a corporation,
Appellee and Cross-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
Civil No. 67-286

Argued May 6, 1977

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(Filed July 6, 1977)

HUNTER, *Circuit Judge:*

Appellant and cross-appellant between them raise ten issues relating to the measure of damages in a judgment won by Edward C. Rea against Ford Motor Company under the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25. After a thorough review of the record, we find merit in only one: the district court erred in deducting from gross damages $160,934.00, an amount that was already part of the assets of Rea's Oldsmobile dealership before Ford's violation of the Act. Hence, we vacate and remand with directions to add that amount to the judgment.

I.

This litigation is more than ten years old. Its tortuous history was set forth in an earlier opinion of the court, *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). We will briefly summarize the underlying facts.

In February of 1964, Rea was given a franchise for a Ford dealership in Monroeville, Pennsylvania. At that time, he was already principal stockholder of an Oldsmobile dealership in Wilkinsburg, Pennsylvania. Rea told Ford that he would acquire assets to operate the Ford dealership by liquidating the Oldsmobile business, and Ford had him sign a letter committing him to take that step.

Subsequently, Rea suggested to a Ford representative that the Oldsmobile operation might not be closed after all. The Ford representative warned Rea that he might halt the shipment of Ford cars to Rea unless he got out of the Oldsmobile business, explaining that Ford believed those assets necessary to the successful operation of the Ford franchise. Shortly thereafter, Rea resigned the Oldsmobile franchise, kept part of its assets, and sold the rest. The retained assets were used in operating the Ford franchise in Monroeville.

In March, 1967, Rea filed a complaint against Ford in the Western District of Pennsylvania. It alleged breach of contract, violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and violations of the Automobile Dealers' Day in Court Act. A jury found Ford liable under all of these theories; Ford was ordered to pay some $3,379,683 in damages. On appeal, this Court reversed and remanded. The finding of liability on the contract claim and on some of the Sherman Act claims were reversed. The rest of the Sherman Act claims were sent back for retrial because of a confusion of proofs with the other claims. Liability under the Auto Dealers' Act was upheld, but the case was remanded for a redetermination of damages. On remand, Rea withdrew the antitrust claims, leaving only the question of damages under the Auto Dealers' Act. The district court awarded Rea $136,635.00. Rea appealed from the court's order denying his motion to amend the judgment to include other elements of alleged damage, and Ford cross-appeals.

II.

At the outset, Ford argues that the trial court erred in refusing to allow Ford to introduce evidence tending to establish that: (1) Ford's acts were not the proximate cause of the sale of Rea's Oldsmobile business; (2) Ford's acts were not the proximate cause of any loss in profits by Rea's corporate entities;[1] and (3) Rea failed to "mitigate"

1. The dissent suggests that there was no finding "that Rea had unlimited capacity . . . to perform as manager of both dealerships" simultaneously.

damages and, therefore, Ford had not caused any real harm. These elements of causation, says Ford, go to damages alone and were not foreclosed by this court's affirmance of the finding of liability under the Automobile Dealers' Day in Court Act.

We do not agree. Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage. *Cf. Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1320-21 (5th Cir. 1976) (must be some evidence showing causal link, in order to establish liability in antitrust case, before reaching question of amount of damages); Restatement (Second) of Torts § 430 (1965) (liability for negligence requires finding of causation).

III.

Ford also claims that the court below erred in including Rea's projected salary and bonuses at the last Oldsmobile franchise in the damage calculation. Instead, argues Ford, damages ought to be figured to the corporate entity, with Rea being compensated as that entity's principal stockholder.

Again, we do not agree. The corporate entity that suffered harm was the Oldsmobile franchise, which ceased to exist; the "dealer" for purposes of the action under the Auto Dealers' Act [2] was Edward Rea in his capacity as a *Ford* dealer. *Rea, supra* at 584. In that capacity, he personally suffered damage not only through loss of income as a shareholder of the Oldsmobile business Ford forced him to close, but also through loss of the salary and bonuses he could have earned in that business. Since Rea was injured

1. (Cont'd.)
We do not agree. Our affirmance of liability below was premised on such a finding. Otherwise, there could have been no liability.

2. 15 U.S.C. § 1221(c) provides as follows:
The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

in both respects by Ford's action, he can be made whole only by recovering both types of compensation.

IV.

Ford's last point of appeal is that the trial court erred in awarding Rea damages covering the period between Ford's successful first appeal and the retrial as to damages. Ford claims to have been "penalized" for taking an appeal.

We do not agree. The court merely exercised its ordinary powers. Lost profits are recoverable in an action for the destruction or interruption of an established business, whenever they are not merely speculative or conjectural. *Roseland v. Phister Mfg. Co.*, 125 F.2d 417, 420 (7th Cir. 1942). And, in general, a court has the power to award damages occurring up to the date of the ultimate judgment in the case. *Calhoun v. United States*, 354 F.2d 337, 339 (Ct. Cl. 1965). Ford does not claim that the damages were too speculative; indeed the fact that the injured party—Rea—had survived the intervening period meant precisely that any objection that he might not have lived to suffer "future damages"—those occurring after the first trial—was obviated. As for the supposed "penalty," Ford might likewise claim that it was "penalized" by defending the action at all, since that also prolonged the period for which lost profits might have been recovered.

V.

Rea argues that the injured party is the corporation in which the Ford franchise is lodged. Therefore, he says, damages should have been awarded to the corporation.

We noted above, however, that our first decision in this case attributed the cause of action to Rea himself. *Rea, supra* at 384. Besides, the corporation holding the Ford franchise never owned any part of the Oldsmobile business, so it could not have been injured by the loss of the Oldsmobile dealership. Hence, the damages were properly computed with respect to Rea personally.

VI.

Rea also argues that the trial court erred in deducting from the damages suffered by the Oldsmobile dealership corporation which were awarded to Rea as former principal shareholder—an amount representing federal and state corporate taxes.

If Rea had prevailed in arguing that the Ford dealership was—as some kind of alter ego of the Oldsmobile dealership corporation—the injured party, then this argument would require our close attention. We have already held, however, that Rea—not the Ford dealership—was the party injured by the closing of the Oldsmobile operation. Thus, corporate taxes were properly deducted from any amounts awarded to him as compensation for lost corporate profits.

VII.

Rea contends that the amounts awarded to him representing lost salary and bonus at the Oldsmobile dealership were too low. He compares the amounts to those he actually earned at the Ford dealership, which were substantially higher.

The Ford dealership, however, was twice as large and produced correspondingly greater profits, on which bonuses are figured. After thoroughly reviewing the record, we are unable to say that the trial court's figures were clearly erroneous.

VIII.

Rea insists that the trial court should have awarded him pre-judgment interest. Again, we do not agree.

In general, pre-judgment interest is not awarded on unliquidated claims, such as the one before us. *Miller v. Robertson*, 266 U.S. 243, 258 (1924). It may be awarded in the sound discretion of the trial judge when necessary to arrive at fair compensation. *Id.* The trial court in this case ruled that allowance of interest would create the possibility of double recovery, since some allowance for growth had been made in figuring the sales base on which profits had been figured. We cannot deem this an abuse of discretion.

IX.

Rea's last contention is that the court should not have deducted from the award $160,934.00, the value of the assets transferred from the liquidated Oldsmobile operation to the new Ford Dealership. We agree that this deduction was error.

In our previous opinion in this case, we mentioned the $160,934.00 as one of the items for which some adjustment ought to be made in the redetermination of damages:

> However, the jury's award here failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise. To award 22 Ford recovery of anticipated profits from the Oldsmobile franchise without any deduction for the asset sale or for the fact that it benefited by having the retained cash and assets available for the operation of the new Ford franchise is to permit a double recovery. *Cf.* Gustafson v. General Motors Acceptance Corp., 470 F.2d 1057, 1061 (8th Cir. 1973). The award of damages in favor of plaintiffs for defendant's violation of the Dealers' Act will, therefore, be vacated and the case remanded for a redetermination of such damages in light of this opinion.

Rea, supra at 587 (footnote omitted).

The trial court determined the interest on this amount —$177,940.00. It then deducted $338,874.00, the total of the value of the transferred assets ($160,934.00) plus the interest these assets would have earned ($177,940.00), in order to reflect the benefit of "having the retained cash and

assets available for the operation of the new Ford franchise." *See* App. at 862a.

Deduction of the interest those assets could have earned was proper. The court recognized our concern that Rea was not harmed to the extent that the freeing of his assets in the Oldsmobile business merely allowed him to earn money elsewhere on those same assets. The asset value itself, though, was an amount that Rea's Oldsmobile operation had already earned. It should not have been deducted from the future profits. It cannot be likened to a loan, which would have to be paid back, from the Oldsmobile from dealership to Rea and then to the Ford franchise; instead, it was money that Rea, as a risker of capital, took out of the Oldsmobile venture and put into the Ford operation.

Therefore, we will vacate the judgment of the district court and remand with instructions to add $160,934.00 to the judgment.

GIBBONS, *Circuit Judge*, dissenting

I

I would reverse the judgment of the district court and direct the entry of judgment for the defendant. I think the prior decision of this court, *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974), was incorrectly decided, and that judgment should have been entered in defendant's favor on plaintiff's Dealers' Day in Court Act claim. Neither Rea Oldsmobile, Inc. nor Edward C. Rea, in my view, had causes of action under that statute. Edward C. Rea, Inc., the only entity protected by the statute at the time of the termination of the Oldsmobile franchise, was not injured.

The prior opinion misconstrues an important federal regulatory statute. Only an "automobile dealer" has a cause of action under the Act. 15 U.S.C. § 1222. The prior

opinion treats Edward C. Rea, an officer and employee of a dealer, as if he were an "automobile dealer." That, however is a defined term:

> The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the distribution of passenger cars, trucks or station wagons." 15 U.S.C. § 1221(c).

An officer or employee of a dealer does not fit within that definition. Moreover the dealers' § 1222 cause of action is for "damages by him sustained . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or conditions of the franchise, or in terminating, cancelling or not renewing the franchise with said dealer." 15 U.S.C. § 1222. I do not believe these words can be fairly construed to afford to an officer or employee of the automobile dealer a cause of action for the cancellation of an entirely different franchise held by a separate corporation from a different manufacturer.

The prior opinion justifies that result by reference to the provision in the Edward C. Rea, Inc. contract, in which that corporation represented to Ford Motor Co. that Edward C. Rea would be in charge of its management. I would not hold, as the majority has done, that the dealer's representations as to its overall management, or the management of any of its departments, can be relied upon to confer on the managers a statutory cause of action belonging solely to the automobile dealer. As the Second Circuit said in *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1120 (2d Cir. 1975):

> [w]hen, as here, a dealership is doing business in corporate form, the statute contains no hint that it intends a departure from the established principle that the locus of the right of action is the corporation.

The prior panel opinion is, of course, law of the case and binding on this panel unless the court in banc reconsiders it. I would do so, and reverse.

II

Many of the difficulties with respect to measure of damages arise out of an attempt to award damages under the Dealers' Day in Court Act to a party not within the scope of the Act. Thus, no effort to straighten out this rather hopeless muddle is likely to be satisfactory. But even accepting the notion that plaintiff has a cause of action I respectfully dissent from this court's recalculation of damages. We now increase a judgment of $136,635.00 to $297,069.00. In part this is accomplished by awarding to Edward C. Rea the salary and bonuses he would have earned in the terminated Oldsmobile franchise. Entirely aside from the fact that the Dealers' Day in Court Act makes no provision for compensation to officers and employees of terminated dealerships, and aside from the further fact, alluded to in Point I above, that the cause of action against Ford, if there was any, belonged to Edward C. Rea Inc., that computation results in Rea being compensated both for the salary he "lost" when Rea Olds surrendered its Oldsmobile franchise, and for the salary and bonus he was paid by the very same corporation when it changed its name to Edward C. Rea, Inc. He was, after all, functioning in virtually the same capacity before and after, except that the corporation was now selling Fords instead of Oldsmobiles. The record does not support a finding, nor did the district court find, that Rea had unlimited capacity, mental and physical, to perform as manager of both dealerships. If we are measuring injury to the corporation which held the Oldsmobile franchise, we must deduct, in calculating lost profits, from its projected gross income the anticipated cost of management, since it could not operate without incurring such cost. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108 (3d Cir. 1976)

(Adams, J.), *cert. denied*, 44 U.S.L.W. 3719 (U.S. June 15, 1976). But that does not mean that its manager, who takes an identical job in another franchise, should be paid twice because he happens also to be a stockholder. Certainly Ford is right that the salary and bonus projections should not have been included in the damage calculation, just as Rea is wrong in contending that taxes should have been excluded from that calculation.

Point II of the majority opinion rejects Ford's contention that the court erred in excluding evidence that Rea Olds, Inc., which changed its name to Edward C. Rea, Inc., was insufficiently capitalized to carry on two automobile dealerships at the same time. The majority opinion reasons:

> "Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage."

This does not do justice to Ford's argument. Ford urges that assuming the termination was, as the first jury verdict held, attributable to Ford, the fact remains that the very same corporation immediately put all its assets in a new automobile dealership, where those assets were utilized to the maximum. Ford offered testimony to prove that no new capital was available to that corporation, and that since it could, and did, operate a profitable business with its old capital it suffered no injury in fact, even if Ford did cause termination of the Oldsmobile franchise. Point II of the majority opinion is no answer to this argument. The court did err in excluding the proffered evidence. At the very least a new trial is required.

As to the remaining damage contentions, on the premise on which the majority proceeds I cannot disagree with its treatment of them. But the entire calculation is based on the fundamentally false premise that the Dealers' Day in Court Act gives to an employee of an automobile dealership a cause of action for injury to his interest in a

different dealership holding a franchise from a different manufacturer. I would reverse. At a minimum there should be another trial on damages.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1190

EDWARD C. REA and 22 FORD INC., a corporation,

v.

FORD MOTOR COMPANY, a corporation,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 67-286)

Argued January 7, 1974

Before VAN DUSEN, HUNTER and WEIS,
Circuit Judges

Frank L. Seamans, Esq., John H. Morgan, Esq., Edward G. O'Connor, Esq. & David E. Tungate, Esq., of Eckert, Seamans, Cherin & Mellott, Pittsburgh, Pa.
and
Hugh B. Cox, Esq., Edwin M. Zimmerman, Esq. and James R. Atwood, Esq., of Covington & Burling, Washington, D.C.
Counsel for Appellant

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and

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and
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Counsel for Appellees

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OPINION OF THE COURT

(Filed April 26, 1974)

VAN DUSEN, *Circuit Judge.*

This is an appeal from a judgment of the United States District Court for the Western District of Pennsylvania. The judgment required Ford Motor Company ("Ford") to pay damages to 22 Ford Inc. ("22 Ford"), a corporate franchised Ford dealer, in the amount of $3,350,000. for injuries claimed to have been caused by violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 et seq., and to pay damages to Edward C. Rea ("Rea"), the principal stockholder of 22 Ford, in the amount of $29,683. for breach of an oral contract to convey real estate.

Ford is the second largest manufacturer of automobiles in the United States. It manufactures approximately 25% of the automobiles sold in this country, a market share that has not changed significantly during the period relevant here. With one exception—sales to the United States Government—Ford sells no automobiles directly to ultimate customers but, rather, sells to franchised retail dealers who then resell the automobiles to the public. At the time of trial, approximately 97% of these retail outlets were independently owned and financed. A relatively small number of the remaining 3% of the retail outlets were wholly-owned subsidiaries of Ford.[1] The remainder were "dealer development" outlets in which Ford and private parties share the investment, and which are established in the expectation that the private participant will acquire full ownership of the outlet out of his share of its profits.[2] 22 Ford holds a Ford franchise in Monroeville, Pennsylvania, a suburb of Pittsburgh, which was originally given in February 1964 to Edward C. Rea, Inc. Thereafter the franchise was assigned to 22 Ford with Ford's permission.

The complaint in this case originally alleged seven causes of action. Prior to the trial, the district court granted Ford's motion for summary judgment on the causes of action that sought specific performance of the contract to convey real estate and to establish a lien on the real property involved. See *Rea v. Ford Motor Co.*, 326 F. Supp. 627 (W.D. Pa. 1971), *appeal dismissed* (3d Cir. Nos. 71-1780/1, 1972). At the conclusion of the evidence, the district court directed a verdict for Ford on the claims alleged under the Robinson-Patman Act, 15 U.S.C. § 13(d) and (e).[3] The court denied defendant's motion for a directed verdict on the four remaining causes of action and submitted them to the jury with instructions to return a special verdict in the form of answers to nine questions (see Appendix to this opinion). In response to the court's questions, the jury in substance found: (1) that there was a binding oral contract between Rea and Ford for the transfer of real estate, that Ford had breached the contract, and that Rea had thereby been damaged in the amount of $29,683.; (2) that Ford had violated the Automobile Dealers Act and that 22 Ford had

1. At the time of trial, only 13 of the 6000 Ford outlets in the United States were company owned.

2. In the relevant period, the number of Ford dealer development stores in the United States has ranged between 100 and 170.

3. Those claims were embodied in a separate cause of action and were also urged by plaintiffs in support of their cause of action under the Sherman Act.

thereby been damaged in the amount of $350,000.; (3) that Ford had engaged in a combination or conspiracy which unreasonably restrained interstate trade in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford and had attempted to monopolize such trade, and that plaintiffs had thereby suffered damage in the amount of $1,750,000.; and (4) that Ford had not violated Section 3 of the Clayton Act, 15 U.S.C. § 14, making it unlawful to make a sale or contract for sale of goods on condition that the purchaser shall not use or deal in goods of a competitor, where the effect is substantially to lessen competition or tend to create a monopoly in any line of commerce.

The district court denied Ford's post-trial motions for a directed verdict, or in the alternative, for a new trial, but held that the damages fixed by the jury were excessive and that a motion for a new trial would be granted unless 22 Ford filed a remittitur for all single damages in excess of $1,000,000. *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1973). The plaintiffs filed such remittitur and the district court amended its judgment accordingly. This appeal by Ford involves the three causes of action upon which the district court entered judgment for plaintiffs: the oral contract for the conveyance of real estate, the Automobile Dealers' Act, and the Sherman Act. We shall consider each seriatim.

I. Oral Contract for Conveyance of Real Estate

In response to special interrogatories, the jury found that Ford had orally agreed to sell Rea the real estate in Monroeville upon which 22 Ford and its predecessor have conducted a Ford dealership since December 1964, that Ford failed to perform this contract, and that, as a result, Rea had been damaged in the amount of $29,683, this figure representing the cost to 22 Ford of acquiring and installing trade fixtures in the building used for the dealership. The jury found that there existed a binding oral contract between Rea and Ford, which was then owner of the land, under which Rea was to take title to the land (in his own name or in the name of a corporation formed by him) to lease the land to Ford, with a lease-back from Ford to 22 Ford, and that Ford breached such contract by failing to convey title to Rea. The jury therefore awarded to Rea as damages the cost of the improvements that he had to make in order to get the dealership service facility operating.[4] Although there is sufficient evidence to support the jury's finding of Ford's breach of contract, Rea is not entitled to maintain suit at this time. Under Pennsylvania law, a person who enters and makes permanent improvements on the land of another in reliance on an oral contract for the sale of the land cannot recover for their value so long as he remains in uninterrupted enjoyment of the improvements. *Naftzinger v. Roth*, 93 Pa. 443 (1880).[4a] It is true that Rea, unlike the plaintiff in *Naftzinger*, is not legally entitled to possession of the land and improvements, for the present lessee is not Rea but 22 Ford. However, it is not necessary to "pierce the corporate veil" in order to apply the holding of *Naftzinger* to this case. Rea's contract with Ford, as found by the jury, specifically provided for an eventual lease-back to 22 Ford, and 22 Ford, as lessee, has had the full use and benefit of the equipment and improvements since 1964, has amortized the costs of the equipment, and has taken corresponding deductions on its income tax returns. Moreover, since it appears from the testimony that

4. Under Pennsylvania law, which the parties have agreed covers this claim, damages for breach of a parol contract for the sale of land are limited to the expenses incurred on the faith of the contract. *Polka v. May*, 383 Pa. 80, 84, 118 A.2d 154, 156 (1955); *Rineer v. Collins*, 156 Pa. 342, 27 A. 28 (1893). In its post-trial motions, Ford contended that Rea was not entitled to recover damages since it was 22 Ford that paid for the improvements, but the district court held that the source of the money did not prevent Rea's recovery. *Rea v. Ford Motor Co.*, 355 F. Supp. at 856-57.

4a. There is nothing in the language of *Naftzinger* limiting its holding to the case of a tenant. The rationale of that decision, rather, was that the plaintiff (Roth) was enjoying the use of the land and improvements and therefore had not yet suffered any loss under the terms of the contract, which provided that Roth should move on the property, build himself a house, barn and blacksmith shop, pay rent as long as Naftzinger lived, and receive the property when Naftzinger died.

the value of the improvements was not included in the rental charge by Ford, there has not yet been any loss suffered by 22 Ford, and future losses, if any, are entirely speculative at this time.[5] Therefore, we conclude that Rea, "being in the enjoyment of all that came within the contract, as he stated it," *Naftzinger v. Roth*, 93 Pa. at 448, is not entitled to maintain suit as long as 22 Ford continues in possession and enjoyment of the improvements.[6] Thus that part of the district court's judgment awarding damages to Rea for violation of the oral agreement will be set aside.

II. Automobile Dealers' Day in Court Act Claim

In its pleadings and pre-trial statement, 22 Ford originally alleged that Ford had violated the Automobile Dealers' Day in Court Act ("Automobile Dealers' Act") by refusing to enter into a particular real estate transaction with Rea and by competing with 22 Ford through company-owned dealerships. The district court directed a verdict for Ford on these claims at the close of plaintiffs' case. At the same time, however, the court suggested *sua sponte* a new and different claim under the Automobile Dealers' Act which 22 Ford thereafter embraced. The gist of that new claim was that sometime between February and August 1964 Ford violated the Act by threatening to cease shipping Ford cars to 22 Ford's predecessor as a Ford dealer in Monroeville, unless a separate corporation, in which Rea was the principal stockholder, resigned its franchise as an Oldsmobile dealer in a neighboring town.[7] The evidence underlying that claim is as follows:

5. Such future losses are claimed to be the value of improvements placed on the land by plaintiffs. Conceivably 22 Ford could remain on the property until the improvements had been totally worn out and would, therefore, never suffer any loss.

6. When the lease expires or 22 Ford otherwise is ejected from or leaves the premises, there may at that time be recovery of damages for the unamortized value, if any, of the equipment and improvements. See *Walter v. Transue*, 17 Pa. Super. 94, 100 (1901).

7. Plaintiffs originally claimed that Ford had violated Section 3 of the Clayton Act by requiring 22 Ford not to deal in the goods of a competitor, and testimony about the alleged threat was introduced on that theory. In its

Edward C. Rea, Inc. was given a franchise as a Ford dealer in Monroeville in February 1964. The Ford Sales Agreement which established the terms and conditions of that franchise provides that "the Dealer reserves the right to make purchases from others without obligation or liability of any kind to the Company, provided that the Dealer shall not be relieved of any duty, obligation, or responsibility assumed by the Dealer under this agreement . . . ." At that time Rea was the principal stockholder in another company, then known as Rea Oldsmobile, Inc. ("Rea Olds"), which conducted an Oldsmobile dealership in Wilkinsburg. During the negotiations for the granting of the Ford franchise to Edward C. Rea, Inc., Rea represented to Ford that he would acquire the capital necessary for the operation of the Ford franchise at Monroeville by liquidating the assets of Rea Olds, and Ford required Rea to sign a letter stating his intention to give up the Oldsmobile dealership and to send a letter to Oldsmobile stating his intent to resign.

For a time in 1964 Edward C. Rea, Inc. operated in a temporary facility because a new Ford facility, whose preparation and use required a substantial amount of capital, was not yet available. Sometime between February and August 1964, before the new facility was available, Rea suggested to McClanathan, then district manager for Ford, that Rea Olds might not liquidate its operation. Rea testified that in response McClanathan threatened to stop shipping Ford automobiles to the Monroeville dealership unless Rea Olds resigned its Oldsmobile franchise. McClanathan denied making the alleged threat to withhold cars, but he did testify that he told Rea that he thought the Oldsmobile dealership should be liquidated in order to assure an adequate source of capital for the conduct of the Ford dealership in the new Monroeville facility. Thereafter Rea Olds

7. (Cont'd.)
instructions on the claim under Section 3, the court stated that it did not believe there was any evidence that the alleged conduct of Ford had adversely affected competition, and the jury returned a verdict for Ford on this claim.

resigned the Oldsmobile franchise, retained part of its assets, and sold the remainder to another corporation. Sometime after August 31, 1964, Rea Olds changed its name to 22 Ford, Inc., the present plaintiff, and took over operation of the Ford Monroeville dealership in its new facility. The Ford franchise agreement at Monroeville was assigned to 22 Ford on March 9, 1966, by Edward C. Rea, Inc., which was then dissolved. This assignment was accepted and consented to by Ford on April 21, 1966.

On the basis of this evidence, the jury found that Ford breached its duty "to act in good faith in performing or in complying with any of the terms or provisions of the franchise," as required by Section 2 of the Automobile Dealers' Act, 15 U.S.C. § 1222, and awarded to 22 Ford damages in the amount of $350,000., representing an estimate of the profits that Rea Olds would have made if it had continued to operate the Oldsmobile franchise.

After careful consideration and recognizing the record on the issue of liability presents a close case, we have concluded that defendant is not entitled to either the entry of judgment in its favor or a new trial to determine the question of liability on this claim. Ford challenges the jury's finding that it violated the Automobile Dealers' Act on several grounds.

First, Ford argues that since the protection of the Act is confined to the relations between the manufacturer and its dealer as supplier and distributor, respectively,[8] 22 Ford can recover only for damages sustained by it in its capacity as a Ford dealership as a result of Ford's failure to act in good faith with respect to the operations of that dealership.

8. The legislative history of the Act includes the following statements as to its purpose:

"It imposes upon the factory the affirmative obligation to act in 'good faith' in all dealings or transactions with its dealers." S. Rep. No. 2073, 84th Cong. 2d Sess. 4 (1956).

"These bills impose upon any automobile manufacturer granting a franchise to an automobile dealer the duty of acting in 'good faith' in his relationship with that dealer." Hearings on H.R. 11360 and S. 3879 Before the Anti-Trust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess. 3 (1956) (Introductory Remarks Congressman Celler).

However, plaintiffs produced evidence to show that the coercive statements complained of here were intended to and did cause Rea Olds to surrender its Oldsmobile franchise, and the claimed damages are those suffered by Rea Olds by that surrender; there is no suggestion that Ford's threats were designed to control or coerce the conduct of Edward C. Rea, Inc., as a Ford dealer or that they resulted in any damage to the Monroeville Ford dealership. Furthermore, although Rea Olds, after surrendering its Oldsmobile franchise and liquidating its assets, changed its name to 22 Ford and succeeded to the Ford franchise of Edward C. Rea, Inc., those transactions cannot serve to give 22 Ford a cause of action for injuries predating its affiliation with Ford.[9] Thus, Ford concludes, there is no basis under the Automobile Dealers' Act for the jury's finding that it is liable to 22 Ford for a breach of its duty of good faith.

The district court held, in response to this argument, that this cause of action was included in the transfer of rights under the dealership agreement to 22 Ford in April 1966 and thus 22 Ford, as the successor to the rights of Edward C. Rea, Inc. under the franchise, was entitled to bring suit and recover damages. *Rea v. Ford Motor Co.*, 355 F. Supp. at 862-63. This analysis, however, does not entirely meet the objection raised by Ford, since it assumes one of the points in issue—whether Edward C. Rea, Inc. could recover for the damages suffered by Rea Olds. Nevertheless, we find Ford's argument on this point does not justify its contention that it is entitled to judgment on this claim, for it is based on too narrow and technical an interpretation of who the "dealer" is under the facts of this case. Edward C. Rea was not only a signing party to the franchise agreement between Ford and Edward C. Rea, Inc., but was made essential to the operation of the dealership by its terms, which recited that Ford had entered into the

9. "Unquestionably, the Act does not apply until a manufacturer-dealer relationship has been created." *Lewis v. Chrysler Motors Corp.*, 456 F.2d 605, 606-07 (8th Cir. 1972). See also *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710-11 (10th Cir. 1970).

agreement "in reliance (i) upon the representation and agreement that . . . [Edward C. Rea] substantially participate(s) in the ownership of the Dealer . . . and (ii) upon the representation and agreement that . . . [Edward C. Rea] shall have full managerial authority for the operating management of the Dealer in the performance of this agreement." Rea, therefore, had a cause of action under the Automobile Dealers' Act against Ford for any bad faith in coercing him, as President and principal stockholder of Rea Olds, to surrender the Oldsmobile franchise and to recover damages suffered by Rea Olds as a result of such surrender. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 790-91 (5th Cir. 1971); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965).[10]

Second, Ford argues that even if 22 Ford's claim is a proper one under the Act, the record contains insufficient evidentiary support for the jury's finding of a violation. Ford accepts, as it must, the jury's finding, implicit in its verdict, that McClanathan, Ford's regional manager in the Pittsburgh area, made statements to Rea that could be construed as a threat to terminate the shipment of cars to Edward C. Rea, Inc., unless Rea had Rea Olds surrender its Oldsmobile franchise. Nevertheless, Ford contends that such a threat does not constitute a breach of its duty to act in good faith since its purpose was to force Rea to honor his earlier representations to Ford that he would obtain a substantial part of the capital required for the operation of the new Ford outlet by liquidating the assets of Rea Olds, and thereby to protect Ford's lawful interest in the capital requirements of Edward C. Rea, Inc.[11]

10. We note that Albert D. Rea, the minority stockholder in Edward C. Rea, Inc., although also made essential to the operation of that dealership by the terms of the franchise agreement, is not named as a party to this case. The district court on remand should determine whether Albert D. Rea should be joined as a party under F.R. Civ. P. 19-21 and whether the damages to which Edward C. Rea is entitled by virtue of his percentage of stock ownership should be diminished. See *Coman v. Coman*, — F.2d — (3d Cir. No. 73-1569, Opinion of 2/21/74).

11. Ford points out that the franchise contract required Edward C. Rea, Inc. to maintain at all times and employ in its business such working capital as was required to enable it fully to carry out its obligations and responsibilities under the agreement.

As defined by the Automobile Dealers' Act, the term "good faith" means

> ". . . the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

15 U.S.C. § 1221(e). In applying this definition, it is necessary for the finder of fact to consider not only whether one party brought pressure to bear on the other, but for what reason it did so. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra* at 791. As the district court correctly instructed the jury in this case, relying on *Berry Brothers Buick, Inc. v. General Motors Corp.*, 257 F. Supp. 542, 546 (E.D. Pa. 1966), *aff'd*, 377 F.2d 552 (3d Cir. 1967) (per curiam), a violation of this Act results if there is "a wrongful demand made which will result in sanctions if not complied with" (1523a).

A manufacturer does not breach its duty to act in good faith by terminating a franchise when a dealer has failed to fulfill a reasonable obligation or agreement made in connection with the operation of the dealership. See, *e.g.*, *Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (3d Cir. 1963); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). And among those agreements which a manufacturer may in good faith require that a dealer carry out is the obligation to abide by reasonable net capital guidelines. See *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964).

However, whether a manufacturer has acted with sufficient justification to constitute good faith in bringing pressure to bear on a dealer is a factual question the determina-

tion of which will depend on the circumstances arising in each particular case.[12] As the court stated in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra* at 791, assuming there is evidence supporting a finding of a lack of good faith, "it is up to the jury to determine the redemption value of the facts indicating that the action could have been taken in good faith." We hold that the evidence in this case, as viewed most favorably to the plaintiffs, is sufficient to support the jury's finding that Ford breached its duty to act in good faith by threatening to stop supplying cars to Edward C. Rea, Inc., unless Rea Olds resigned its Oldsmobile franchise. See *Rea v. Ford Motor Co.*, 355 F. Supp. at 857-61. The effect of that threat was to violate the dealer's right to purchase cars from other manufacturers, which right was not only guaranteed by the franchise agreement but apparently also of particular concern to Congress when it enacted the law.[13] While there was also testimony that Ford's motive was to assure that its dealer met its capital guidelines by carrying out what it had earlier represented it would do, the credibility and weight to be given to that testimony in determining the issue of good faith were properly left to the jury.

Third, Ford argues that 22 Ford is not entitled to maintain this cause of action under the Act, since it did not give notice to the Chairman of the Company's Dealer Policy Board of the statements of McClanathan as required by the

12. In *Globe Motors, Inc. v. Studebaker-Packard Corp., supra,* the dealer challenged the good faith of the imposition of the financial requirements and the insistence by the manufacturer that they be met; hence, there was never any question as to whether or not the manufacturer's actions were motivated by a desire to protect his legitimate interest in the capital condition of the dealer.

13. "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of parts, accessories, and tools made or approved by the manufacturer." H. Rep. No. 2850, 84th Cong., 2d Sess. (1956), quoted at 3 U.S. Code Cong. & Admin. News 4603 (1956).

provision of the franchise agreement which sets up procedures for review of allegedly unfair actions by Ford or its representatives.[14] The district court found that there is nothing in that provision which requires a dealer to submit disputes to the Dealer Policy Board as a prerequisite to bringing suit in court for violation of the Act. *Rea v. Ford Motor Co., supra* at 862. We need not decide this issue on this record, since defendant does not appear to have raised this defense prior to the return of the jury verdict. However, in light of the Act's purpose,[15] it may be that a dealer should not be denied the opportunity to pursue his statutory cause of action because of a failure to invoke a contractual grievance procedure. See *Blenke Brothers Co. v. Ford Motor Co.*, 217 F. Supp. 459, 464 (N.D. Ind. 1963).

Finally, Ford argues that the introduction of a new theory of liability at the close of the plaintiffs' case prejudiced Ford in its defense to the Dealers' Act claim. In particular, Ford points out that the question of whether Edward C. Rea, Inc. would have had adequate capital to carry on the Ford franchise absent the liquidation of Rea Olds did not become relevant until that time.[16] Thus, Ford

14. Paragraph 2(g) of the franchise contract provides:

"In the interests of maintaining harmonious relationships between the parties to this agreement, the Dealer shall report promptly in writing to the Chairman of the Company's Dealer Policy Board, or to such other person as may be designated by the Executive Committee of the Company from time to time, any act or failure to act on the part of the Company or any of its representatives, which the Dealer deems not to have been, or that the Dealer proposes to use in support of a claim that the Company has not acted, in good faith as to the Dealer. For the purposes of this subparagraph 2(g), the term 'good faith' shall mean the Company and its representatives acting in a fair and equitable manner toward the Dealer so as to guarantee the Dealer freedom from coercion, intimidation, or threats of coercion or intimidation from the company."

15. The statute has as its purpose to create "a cause of action where none previously existed in that, *irrespective of contractual provisions,* it grants a right of review in the Federal courts of disputes between automobile manufacturers and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing franchises." (Emphasis supplied.) H. Rep. No. 2850, 84th Cong., 2d Sess. (1956), quoted at 3 U.S. Code Cong. & Admin. News 4596 (1956). See also *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959).

16. The pre-trial proceedings, including discovery, and a large part of the trial were conducted on the assumption that McClanathan's threats were relevant only to the claim under Section 3 of the Clayton Act. Ford's principal

contends, since it did not receive any pre-trial notice that this would be a decisive issue in the case, it was denied a fair opportunity to prepare and present a full showing that the liquidation of Rea Olds was necessary to provide Edward C. Rea, Inc. with sufficient capital to discharge its obligations as a Ford dealer.

After an examination of the record, we cannot say that it was an abuse of discretion for the district court to submit this claim to the jury in spite of the failure of plaintiffs to allege it prior to trial, or, in fact, until the end of their case, when it was suggested by the trial judge. See *Rea v. Ford Motor Co., supra* at 861-62. Ford had the opportunity to, and did in fact, introduce evidence tending to demonstrate that Ford reasonably believed that the assets of Rea Olds were Rea's sole source of capital for the operation of the Ford dealership.[17] It is possible that with more advance notice, Ford could have adduced further evidence to establish with greater certainty the objective necessity for Rea Olds' liquidation of its franchise.[18] However, the issue before the jury was Ford's *good faith* in pressuring Rea to surrender the Oldsmobile franchise.

While we thus conclude that the jury's finding that Ford violated the Automobile Dealers' Act should be sustained, we hold that its award of damages thereunder is excessive and must be set aside. The jury's award of $350,000. apparently represents a straight-line projection of Rea Olds' estimated profits over the period from its termination of the GM franchise in September 1964 to the time of trial in May 1972, based upon a formula devised by

16. (Cont'd.)
defense to that claim was that there had been no substantial lessening of competition, a defense which was ultimately accepted, but which was of no relevance under the Dealers' Act.

17. McClanathan and a second Ford representative testified that Rea had never indicated to them that he had any source of capital to invest in a Ford dealership except the assets of Rea Olds.

18. For example, Ford might have been able to find evidence to rebut Rea's testimony that he believed that if Rea Olds was not liquidated, he could have borrowed the required capital from a friend, Mr. Aiken, or from two banks.

Dr. Staelin, 22 Ford's expert. It has been held that an automobile dealer may recover damages for the loss of future profits resulting from the manufacturer's wrongful conduct under the franchise agreement. See *American Motors Corp. v. Semke*, 384 F.2d 192, 199-200 (10th Cir. 1967). However, the jury's award here failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise.[19] To award 22 Ford recovery of anticipated profits from the Oldsmobile franchise without any deduction for the asset sale or for the fact that it benefited by having the retained cash and assets available for the operation of the new Ford franchise is to permit a double recovery. *Cf. Gustafson v. General Motors Acceptance Corp.*, 470 F.2d 1057, 1061 (8th Cir. 1973). The award of damages in favor of plaintiffs for defendant's violation of the Dealers' Act will, therefore, be vacated and the case remanded for a redetermination of such damages in light of this opinion.

III. Sherman Act Claims

As alleged in its complaint and developed at trial, 22 Ford's claims under the Sherman Act, 15 U.S.C. §§ 1 and 2, rested primarily on the charge that Ford had violated Sections 1 and 2 of the Act by its operation of company-owned and dealer development outlets in the Pittsburgh area. In its pre-trial statement, 22 Ford added an additional claim that by reason of certain arrangements with nationwide car rental companies, such as Hertz and Avis, Ford had engaged in unlawful price fixing. The jury's award of damages to 22 Ford under the Sherman Act apparently rested

19. The trial judge instructed the jury either to adopt or reject, in whole or in part, Dr. Staelin's estimate of the profits the Oldsmobile dealership would have earned from September 1, 1964, to the date of trial (1526a). That estimate was a projection based on past profits of the Oldsmobile franchise. Thus, neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash and retained assets.

for the most part on the claim relating to the operation of the company-owned outlets.[20]

1. *The Claim Based On Ford's Operation of Company-Owned Outlets*

22 Ford claimed that in the Pittsburgh area Ford pursued a plan to operate its company-owned and dealer development stores in such a way as to impose an unreasonable restraint on interstate trade and for the purpose of driving independently owned Ford dealers out of the business of selling Ford automobiles. Although 22 Ford asserted that this plan was nationwide in scope, its evidence was directed primarily to Ford's operation of Triangle Motors ("Triangle"), a company-owned Ford dealership located in the East Liberty section of Pittsburgh.[21]

Triangle became a Ford-owned dealership in March 1961 when its independent operator fell into financial difficulty. It is undisputed that the dealership made rather modest profits in 1961, 1962, 1964 and 1968 and had losses, occasionally heavy losses, in other years until its closing in May 1969,[22] and that Triangle received from Ford substantial capital contributions, as well as loans which were largely repaid.

In addition, Bernard Schroll, who had been president and manager of Triangle from 1962 to 1967, testified that local Ford employees persuaded him to make expenditures

20. In its special verdict, the jury did not award separate damages for each violation of the antitrust laws. However, in its opinion denying Ford's post-trial motions, the district court took the view that the price-fixing charge accounted for only $34,200. of the $1,750,000. single damage award by the jury under the Sherman Act. Accordingly, in its opinion on defendant's post-trial motions and remittitur reducing all antitrust single damages to $1,000,000., the court attributed $34,200. in damages to the price-fixing charge.

21. Triangle was the only company-owned outlet selling Ford automobiles in the Pittsburgh sales district, except for a period of several months when there was one other company store. Ford also operated up to three company-owned Lincoln-Mercury outlets in Allegheny County, and their financial records were placed in evidence. Allegheny Ford Truck Sales, Inc. is also wholly owned by Ford, but it sells no Ford passenger automobiles.

22. The profits averaged about $22,000., with a high of approximately $35,000. and a low of approximately $15,000. The losses averaged $63,000., with a high of $112,000. and a low of $10,000.

for advertising and sales personnel which in his opinion were excessive,[23] and to sell as many cars as possible without regard to the dealership's profitability. Schroll also related several statements made to him by various Ford representatives purporting to show that Ford was prompted by a specific intent to drive independent Ford dealers like 22 Ford out of business and to monopolize the retail distribution of Ford cars.[24]

Finally, 22 Ford relied upon the opinion testimony of Richard Staelin, an assistant professor of marketing at Carnegie-Mellon University, to support its antitrust claims. Through the use of tables, Dr. Staelin showed that Triangle and other selected Ford and Lincoln-Mercury outlets operated at a loss in some years and attributed such losses to expenditures on "market variables" like advertising, rent, and sales personnel. On the basis of a theoretical mathematical model, Dr. Staelin concluded that it would be to Ford's economic advantage to operate company outlets at a loss because it could thereby increase its manufacturing profit by diverting sales from its competitors, such as General Motors and Chrysler. He therefore characterized those losses as a "subsidy" or "discount" given by Ford to its company-owned outlets. Dr. Staelin postulated that while such a policy would increase Ford's manufacturing profits by diverting sales from its competitors, it would also divert some sales from independent Ford dealers. However, he did not offer any evidence that in fact the operations of Triangle or other Ford company-owned stores had diverted any sales from Ford independent dealers and

23. Rea also testified that he thought Triangle's advertising was in excess of what he could afford as a privately financed dealer, but no records of 22 Ford were introduced to compare the advertising expenditures of the two dealerships.

24. This testimony appears at pp. 539a-44a of the record. Ford argues that it is implausible to suppose that it intended to drive out of business its independent dealers in view of its reliance on them for the distribution of nearly all of the automobiles it manufactures and that the alleged statements by Ford executives must be interpreted as meaning that Ford intended to achieve market dominance over competing manufacturers.

took the position that the effect of those operations on 22 Ford was not relevant to his testimony.

Dr. Staelin proceeded to estimate the damages on 22 Ford's antitrust claim by computing the average loss-per-car suffered by those company-owned Ford and Lincoln-Mercury outlets whose financial records he had used as the basis of his model. Dr. Staelin reasoned that 22 Ford was entitled to receive from Ford the same amount of "subsidy" for each car it had sold. Accordingly, he multiplied the average annual loss-per-car of the Ford-owned outlets times the annual sales of 22 Ford. Apparently based on these calculations, the jury awarded $1.75 million in single damages on 22 Ford's antitrust claims, which the district court remitted to just under $1 million because of its view that Dr. Staelin had made an erroneous assumption in his calculations.

Ford has advanced a number of arguments why the verdict against it on this claim is erroneous and should be set aside. However, it is necessary for us to consider only one which we find meritorious and dispositive of this claim.

It is well established that a person seeking to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. §15, cannot prevail merely by proof that the defendant has violated the antitrust laws. In addition, he must prove that the violation was a material cause of some injury to his business or property. See *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1115 (3d Cir. 1973); *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830, 833 (3d Cir.), *cert. denied*, 371 U.S. 829 (1962).[25] This principle is in no way qualified by the rule that once a plaintiff has shown that illegal conduct has caused some injury to

25. *Accord, Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 802 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 632 (5th Cir. 1966); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11, 15 (6th Cir. 1959); *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972); *Duff v. Kansas City Star Co.*, 299 F.2d 320, 322 (8th Cir. 1962); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 579 (10th Cir.), *cert. dismissed*, 371 U.S. 801 (1962).

his business or property, the trier of fact may make a reasonable estimate of damages, for a distinction must be made in claims under Section 4 of the Clayton Act between the fact of damages ("injury") and the amount of damages. See *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 562 (1931); *Flintkote Co. v. Lysfjord, supra* at 392.

The record here provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford. There was no evidence that Triangle or any other Ford Company outlet engaged in predatory price cutting,[26] or that 22 Ford had been compelled to lower its prices because of such price cutting. Nor did 22 Ford attempt to prove that it had incurred greater operating expenses than it would have had to incur absent the operations of Triangle and other company outlets. There was no evidence that 22 Ford lost sales to Triangle because of the latter's prices, advertising, number of salesmen, or any other reason.[27] Finally, 22 Ford made no claim and presented no evidence that it had lost profits because of the operations of Triangle or other company outlets. Indeed, 22 Ford's counsel expressly disavowed any such claim:

> "What our position is in this case is what 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford." (1281a)

Instead of attempting to prove that Triangle's operations had been the cause of some injury to the business or

26. Indeed, the evidence indicated that Triangle charged an average of $50 *more* per car than did 22 Ford.

27. The evidence demonstrated that 22 Ford's percentage of sales in Pittsburgh's East Liberty area did not increase after Triangle and its successor went out of business. Such evidence tends to support the conclusion reached by a market analysis introduced by Ford that 22 Ford and Triangle serviced generally different market areas with only a limited number of overlapping potential customers.

property of 22 Ford, 22 Ford chose to rely on the testimony of Dr. Staelin which suggested that Ford had provided "subsidies" to its company outlets for the purpose of increasing Ford's share of the total automobile market and which assumed that 22 Ford was entitled to receive in damages a comparable subsidy. Dr. Staelin's theory, however ingenious, simply does not establish the fact of injury required to recover treble damages under the Clayton Act. Nor can the absence of evidence as to injury be remedied by the district court's observation that "[i]n this day of mobility, it is reasonable to expect that customers would travel from one Ford dealer to another in the Allegheny County area to select a new car, particularly where they might be attracted by massive advertising and aggressive tactics of numerous salesmen." While such a conclusion is reasonable, it is also entirely speculative and cannot support the necessary finding that 22 Ford sustained an injury to its business or property as required by Congress for recovery under § 4 of the Clayton Act.

We conclude that there is insufficient evidence in this case that Ford's operation of its company-owned outlets caused any economic injury to 22 Ford and therefore that 22 Ford was not entitled to an award of damages for its alleged violations of the Sherman Act.[28] This decision, however, in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly-owned outlets, and where a violation of those laws causes injury to

28. It would also appear that plaintiffs failed to establish a claim under Section 2 of the Sherman Act, since there was no evidence that Ford and its dealers were able to exclude actual or potential competition in the retail trade from the greater Pittsburgh market area and, therefore, had a dangerous probability of achieving monopolization in a relevant market. See *American Tobacco Co. v. United States*, 328 U.S. 781, 784-86, 809 (1946); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 971 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). Furthermore, in view of this rule as to what constitutes an attempt to monopolize, it would appear to have been error for the district court to deny defendant's requests for charge Nos. 7 and 8.

the business of a competitor, they will be liable for damages. See, for example, *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968).

2. *The Price-Fixing Claim*

22 Ford's claim for damages as a result of Ford's alleged violations of the Sherman Act also rested on the contention that Ford had conspired with Hertz and Avis to fix the price at which those rental companies would buy new cars from 22 Ford and other dealers. The evidence showed that for many years the two major car rental companies had bought new Fords, as well as cars of other makes, from dealers at a fixed price of $50. over the manufacturer's invoice price to the dealer less 1%. Such price uniformity, especially if at an artificial level not related to the supply and demand of a given commodity, may be evidence from which an agreement or understanding, or some concerted action operating to restrain commerce, may be inferred. See *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F.2d 175 (7th Cir. 1948), *aff'd sub nom. Clayton Mark & Co. v. Federal Trade Commission*, 336 U.S. 956 (1949). Furthermore, after a careful review of the record, we believe that there is sufficient evidence to support an inference that Ford was a party to an agreement or understanding to fix the price at which Ford dealers would sell to Hertz and Avis.[29] Although Ford did not require its dealers to sell cars to Hertz or Avis, its agreement to the formula price would tend to lend support to the demand of the car rental companies that dealers sell at that price and, therefore, constitutes a restraint of trade in violation of § 1 of the Sherman Act. However, we cannot be sure whether the jury's affirmative answer to question 6, finding a "contract, combination or conspiracy . . . which un-

29. In a memo to Avis whose purpose was "to confirm the basic procedures of our 1963 Summer Rental Promotion as outlined in discussions between the Ford Division Fleet Sales Department and Avis Rent-A-Car System, Inc.," Ford stated that "[w]e understand that the price you are willing to pay is the dealer's net cost plus one-half of the two per cent holdback plus an additional $50."

reasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level" (see Appendix to this opinion), was based on this price-fixing claim or on the claim arising out of the operation of company-owned outlets described above. For this reason, a new trial is required on this claim.

Because there will be a new trial on this claim, it is appropriate to comment on defendant's contention that there has been no proof of injury or amount of damages resulting from the alleged price-fixing agreement. On the issue of injury, 22 Ford again relied upon the opinion testimony of Dr. Staelin, who estimated that under competitive market conditions the price the auto rental companies would have had to pay per car was $76. higher than the formula price. Ford contends that this testimony fails to establish its alleged antitrust violation *caused* the alleged loss of revenue, see *Deaktor v. Fox Grocery Co.*, 475 F.2d at 1115, arguing that it was necessary for 22 Ford to show that, absent the alleged price-fixing arrangements Avis and Hertz would have purchased new cars from 22 Ford at a higher price than the formula price. We find this to be an unduly restrictive view of causation under the facts of this case. The Supreme Court has held that a plaintiff's

> "burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under §4."

Zenith Corp. v. Hazeltine, 395 U.S. 100, 114 n.9 (1969). The Court in *Zenith* went on to explain its view of causation as follows:

> "The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow v. RKO Pictures, Inc., supra* [327 U.S. 251 (1946)] at 264. See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-79 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931)."

Id. at 123-24. There is sufficient evidence that the price-fixing agreement between Ford, Hertz and Avis would tend to injure plaintiff's business and that the formula price was lower than the free market price would be.[30] Moreover, Dr. Staelin testified that he could not conclude that the formula price was entirely the result of the buying power of the rental companies, but rather that it seemed to him that the way Ford dealt with Hertz and Avis contributed to the absence of a competitive market (922a). Although there is also some evidence in the record that Hertz and Avis possessed sufficient market power to impose the formula price on retail dealers even without the agreement of Ford,[31] we do not believe that it was of such weight as to

30. Since the market in new Ford cars was not competitive, both because of the price-fixing agreement with Ford and the buying power of Hertz and Avis, it would be inappropriate to require 22 Ford to show that it could have sold cars to Hertz and Avis at a higher price than the formula price. Ford's reliance on *Gottesman v. General Motors Corp.*, 310 F. Supp. 1257, 1260 (S.D. N.Y. 1970), *aff'd on other grounds*, 436 F.2d 1205 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971), is therefore misplaced.

31. The evidence indicates that Hertz and Avis have been able to establish and maintain the formula price for many years, not only for new Fords but also for new cars of other manufacturers, and that this practice of formula pricing goes back to before the date of any of the specific transactions or documents upon which 22 Ford relied to establish the price-fixing arrangement. The evidence also shows that 22 Ford was only one of numerous outlets from which Hertz and Avis could have purchased new Fords and that when those rental companies were unable to obtain cars at the formula price from one Ford dealer, they simply resorted to another.

have required a jury finding that the price-fixing agreement was not a material cause of 22 Ford's injury.

We therefore conclude that there is sufficient evidence from which a fact finder could find that 22 Ford was injured in its business as a result of Ford's price-fixing agreement with Hertz and Avis and is entitled to recover treble damages under § 4 of the Clayton Act. As to defendant's contentions concerning proof of damages,[32] we need only note that the Supreme Court of the United States has held that in cases where a wrongful act precludes

> "ascertainment of damages more precisely, by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions . . . the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co. v. Paterson Co., supra,* 561-4; *Eastman Kodak Co. v. Southern Photo Co., supra,* 377-9."

Bigelow v. RKO Radio Pictures, Inc., supra at 264.

For the foregoing reasons, the district court judgment of May 27, 1972 (filed May 30, 1972—1564a), as amended by orders of December 26, 1972 (1668a) and January 16, 1973 (1676a), will be vacated and the case will be remanded to

32. We note that we cannot be certain of how much of the lump sum damages stated by the jury in answer to question 9 was intended to be allocated to the price-fixing claim. We are not bound by the district court's attribution of $34,200. in damages to the price-fixing claim (see note 20, *supra*). In his testimony Dr. Staelin presented two different estimates of these damages —$34,200. and $90,000. The first figure was obtained by multiplying the $76. differential per car between the formula price and the competitive market price times the number of cars (450) 22 Ford allegedly sold to Hertz and Avis during the relevant period. The second figure is the product of the $76. differential and an estimate of the percentage of fleet sales (5%) that 22 Ford was expected to attain over that period. Although the district court mentioned only the former estimate in its charge, it did not explicitly limit the jury to that figure.

the district court for the entry of an order, consistent with this opinion, granting (1) judgment for defendant on the cause of action for violation of the oral contract, and reserving to plaintiff Rea the right to sue for damages at the appropriate time, if any, in the future;[33] (2) a new trial on the issue of damages on the cause of action for violation of the Automobile Dealers' Act; (3) judgment for defendant on that part of the cause of action under the Sherman Act concerning Ford's operation of its wholly-owned retail outlets; and (4) a new trial on that part of the cause of action under the Sherman Act concerning the price-fixing agreement between Ford and Hertz and Avis.

33. See page 5A, including notes 5 and 6, above.

APPENDIX TO OPINION OF APRIL 26, 1974
in
REA, et al. v. FORD MOTOR COMPANY
(3d Cir. No. 73-1190, at 1670a-1672a)

SPECIAL VERDICT

In accordance with instructions of the court, the jury hereby finds as follows:

(1) Was there a binding contract between plaintiff, Edward C. Rea, and defendant, Ford Motor Company, whereby Rea would acquire the title to so-called Balison tract of land in Monroeville, Allegheny County, Pennsylvania?

Answer: "Yes".

(2) If your answer to the first question is "yes", what were the terms of the contract?

(a) that Rea was to take title in his own name or in the name of a corporation formed by him and lease the same to defendant, Ford Motor Company, for a term of years with a lease-back from Ford Motor Company to 22 Ford, Inc., Rea's Dealership? (The so-called *direct-lease plan.*)

Answer: "Yes".

(3) Do you find that the defendant, Ford Motor Company, breached its agreement as found by you in your answers to Questions 1 and 2?

Answer: "Yes".

(4) If your answer to Number 3 is "yes", what amount of damages do you award Edward C. Rea for such breach of contract?

Answer: "$29,683.00".

(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc.

and Ford Motor Company as required by the Automobile Dealers Act?

Answer: "Yes".

If your answer is "yes", what amount of damages do you award plaintiff, 22 Ford, Inc., for this breach of duty?

Answer: "$350,000.00."

(6) Did defendant enter into any contract, combination or conspiracy which was in effect during the period since February 11, 1964, and which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

Answer: "Yes".

(7) Did the defendant during the period from February 11, 1964, attempt to monopolize interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

Answer: "Yes".

(8) Did the defendant violate Section 3 of the Clayton Act making it unlawful to make a sale or contract for sale of goods or commodities on condition that the purchaser shall not use or deal in goods and commodities of a competitor, *viz:* Oldsmobile automobiles manufactured by General Motors Corporation where the effect was substantially to lessen competition or tend to create a monopoly in any line of commerce?

Answer: "No".

(9) If your answer to either 6, 7 or 8 or any of them is "Yes" what damages did plaintiffs sustain by reason of any such violation of the antitrust laws?

Answer: "$1,750,000.00".

(Signed by the Jury.)

May 25, 1972.

WEIS, *Circuit Judge*, Concurring and Dissenting:

I concur with the well reasoned opinion of the majority, except with respect to the entry of judgment in favor of the defendant on Count I. I would affirm the judgment in favor of Rea in the amount of $29,683.00.

Count I is a claim for damages resulting from the breach of an oral contract for the sale of realty. This phase of the litigation is based solely on Pennsylvania law and is in the federal courts only by reason of pendant jurisdiction.

Pennsylvania follows the general doctrine that the corporation is an entity separate and distinct from its stockholders. "It is only when justice or public policy demands it and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless that the court will disregard the corporate identity." *Fedun v. Mike's Cafe, Inc.*, 204 Pa. Super. 356, 362, 363, 204 A.2d 776 (1964), *aff'd.*, 419 Pa. 607, 213 A.2d 638. None of these exceptions is presented here.

The contract was executed by Rea as an individual. It is he who has the cause of action for the breach as the jury found in answering special interrogatories. Although Rea holds a majority of the stock in 22 Ford Inc., he is not the tenant. It is the corporation which holds the lease from Ford.

The rule for which *Naftzinger v. Roth*, 93 Pa. 443 (1880), is cited has relevancy only to a person in possession. It can be applied to this case only if the legal distinction between Rea and 22 Ford, Inc. is obliterated.

Ford was well aware that Rea did not intend to have the dealership-tenant be the landowner. The defendant was not misled in any fashion, has not shown any fraud, and is not now entitled to claim that the corporate veil should be pierced.

I find no error in the district court's disposition of Count I, and would affirm its judgment in favor of the plaintiff.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C

United States District Court

W.D. Pennsylvania

Civ. A. No. 67-286

EDWARD C. REA and 22 FORD, INC., a corporation,

v.

FORD MOTOR COMPANY, a corporation.

Robert E. Wayman and Thomas M. Kerr, Pittsburgh, Pa., for plaintiff.

John H. Morgan and Frank Seamans, Pittsburgh, Pa., for defendant.

MEMORANDUM OPINION

DECEMBER 18, 1975

RETRIAL OF ISSUE OF DAMAGES FOR VIOLATION OF AUTOMOBILE DEALERS' DAY IN COURT ACT CLAIM

KNOX, District Judge.

The history of this protracted litigation, which has now been pending for eight and one-half years, is fully set forth in the decision of this court denying motion for new trial and judgment NOV reported at 355 F.Supp. 842 (W.D. Pa.1973) and in the decision of the Court of Appeals for this Circuit, *Rea v. Ford Motor Co.*, 497 F.2d 577 (1974).

A short resume of this history is, however, necessary for an understanding of the problem presently before the court. Edward C. Rea and the corporation known as 22 Ford, Inc. in which he, Rea, was the principal stockholder sued Ford Motor Company on a variety of claims. As finally presented at the first trial of this action, these included a claim for damages for breach of an oral contract to convey real estate, claims for treble damages under the Sherman Act, 15 U.S.C. §§ 1 and 2, claims for violation of the Robinson Patman Act and a claim for damages for violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 et seq. At the conclusion of the evidence, this court directed a verdict for the defendant Ford on claims under the Robinson Patman Act, 15 U.S.C. §§ 13(d) and (e). We subsequently held the verdict excessive to the extent that it exceeded $1,000,000 and directed a new trial unless a remittitur was filed. Plaintiffs did file a remittitur, but the defendant took an appeal.

On appeal, the Third Circuit denied recovery for breach of oral contract to convey real estate and also denied recovery for violations of the Sherman Antitrust Act, 15

U.S.C. §§ 1 and 2 to the extent that the verdict was based upon the operation of company-owned and dealer-development outlets in the Pittsburgh, Pennsylvania, area. The court did hold, however, that the facts justified the jury's finding as to liability for violation of the Automobile Dealers' Act and that there was sufficient evidence of price fixing between Ford and the national rental companies, Hertz and Avis, to justify this claim being submitted to the jury. The court, however, decided that it could not determine to what extent the jury's verdict was based upon violations of the Sherman Act other than price fixing with Hertz and Avis and directed that a new trial concerning this price fixing be awarded. The court directed with respect to the Automobile Dealers' Act that a new trial on the issue of damages only be awarded. This new trial on damages has been held and is before the court presently for determination on the merits.

With respect to the price fixing arrangements between Ford on the one hand, and Hertz and Avis, the national car rental companies, on the other, trial of this issue was severed from the issue of damages under the Automobile Dealers' Act, and considerable discovery was had in preparation for retrial. The plaintiff has, however, elected not to make discovery of certain evidence in accordance with the orders of this court (which directed that making its records available to the defendant would be sufficient) and rather than make such discovery withdrew the cause of action for such price fixing. Therefore, the determination of damages for violation of the Automobile Dealers' Act—if, as and when finally decided—will finally put an end to this lengthy litigation.

The parties agreed that the question of damages for violation of the Automobile Dealers' Act would not require a jury but the same was submitted to the court for trial non-jury.

Violation of the Automobile Dealers' Act, as to which the evidence has been held by the Circuit to be sufficient to justify the jury verdict on liability, is based upon the following facts, as recited in the opinion of the circuit, 497 F.2d 577 at 582.

> "Edward C. Rea, Inc. was given a franchise as a Ford dealer in Monroeville in February 1964. The Ford Sales Agreement which established the terms and conditions of that franchise provides that 'the Dealer reserves the right to make purchases from others without obligation or liability of any kind to the Company, provided that the Dealer shall not be relieved of any duty, obligation, or responsibility assumed by the Dealer under this agreement ....' At that time Rea was the principal stockholder in another company, then known as Rea Oldsmobile, Inc. ('Rea Olds'), which conducted an Oldsmobile dealership in Wilkinsburg. During the negotiations for the granting of the Ford franchise to Edward C. Rea, Inc., Rea represented to Ford that he would acquire the capital necessary for the operation of the Ford franchise at Monroeville by liquidating the assets of Rea Olds, and Ford required Rea to sign a letter stating his intention to give up the Oldsmobile dealership and to send a letter to Oldsmobile stating his intent to resign.
>
> "For a time in 1964 Edward C. Rea, Inc. operated in a temporary facility because a new Ford facility, whose preparation and use required a substantial amount of capital, was not yet available. Sometime between February and August 1964, before the new facility was available, Rea suggested to McClanathan, then district manager for Ford, that Rea Olds might not liquidate its operation. Rea testified that in response McClanathan threatened to stop shipping Ford automobiles to the Monroeville dealership unless Rea Olds resigned its Oldsmobile franchise. McClanathan denied making the alleged threat to withhold cars, but he did testify that he

told Rea that he thought the Oldsmobile dealership should be liquidated in order to assure an adequate source of capital for the conduct of the Ford dealership in the new Monroeville facility. Thereafter Rea Olds resigned the Oldsmobile franchise, retained part of its assets, and sold the remainder to another corporation. Sometime after August 31, 1964, Rea Olds changed its name to 22 Ford, Inc., the present plaintiff, and took over operation of the Ford Monroeville dealership in its new facility. The Ford franchise agreement at Monroeville was assigned to 22 Ford on March 9, 1966, by Edward C. Rea, Inc., which was then dissolved. This assignment was accepted and consented to by Ford on April 21, 1966."

The court has held a full hearing on the question of damages resulting from the violation of the Automobile Dealers' Act, liability having been determined by the jury, and has also held full argument and considered extensive briefs with respect thereto and is now prepared to decide the matter on the merits. This apparently simple question bristles with difficult problems.

(A) Limitation on Amount of Damages by Jury's Verdict in First Trial.

In the first trial the jury, having found that Ford had violated the Automobile Dealers' Act, awarded plaintiffs $350,000 damages representing the loss of profits as a result of the forced sale of the Oldsmobile franchise. The Circuit held that defendant was not entitled either to entry of judgment in its favor or to a new trial to determine the question of liability on this claim. After discussing the question of liability, the Circuit then went on to hold as follows:

"While we thus conclude that the jury's finding that Ford violated the Automobile Dealers' Act should be

sustained, we hold that its award of damages thereunder is excessive and must be set aside. The jury's award of $350,000. apparently represents a straight-line projection of Rea Olds' estimated profits over the period from its termination of the GM franchise in September 1964 to the time of trial in May 1972, based upon a formula devised by Dr. Staelin, 22 Ford's expert. It has been held that an automobile dealer may recover damages for the loss of future profits resulting from the manufacturer's wrongful conduct under the franchise agreement. See *American Motors Corp. v. Semke*, 384 F.2d 192, 199-200 (10th Cir. 1967). However, the jury's award here failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise. To award 22 Ford recovery of anticipated profits from the Oldsmobile franchise without any deduction for the asset sale or for the fact that it benefited by having the retained cash and assets available for the operation of the new Ford franchise is to permit a double recovery. *Cf. Gustafson v. General Motors Acceptance Corp.*, 470 F.2d 1057, 1061 (8th Cir. 1973). The award of damages in favor of plaintiffs for defendant's violation of the Dealers' Act will, therefore, be vacated and the case remanded for a redetermination of such damages in light of this opinion."

In its conclusion the Circuit directed and the district court, pursuant to the Circuit's mandate, ordered: "A new trial on the issue of damages on the cause of action for violation of the Automobile Dealers' Act." 497 F.2d at 593.

We have heard extensive evidence on the question of these damages giving due consideration to the amount realized by sale of the Oldsmobile franchise and the effect of the retention of this cash and certain other assets of Rea Oldsmobile, Inc. and the application thereof to the

operation of the Ford franchise. Plaintiffs' evidence at the second trial discloses damages substantially in excess of $350,000. The defendant, on the other hand, contends that $350,000 is the upper limit of the damages to be allowable, being the amount fixed by the verdict in the first trial. From this, deductions for various items, particularly the application of the sales price and remaining assets of Rea Olds to the Ford franchise, should be made.

The court considers the plaintiffs' position on this to be correct, and we are not limited to an award of damages not exceeding $350,000 less certain deductions.

The general rule is that where a new trial has been ordered "the issues stand as though they had never been tried, the cause is to be tried de novo, and the whole case, including the issues of fact at the former trial, is open for hearing and determination". See 66 Corpus Juris Secundum New Trial § 230, page 582. It is further stated "on a new trial for damages only, plaintiff is not restricted to recover solely for injuries apparent at the former trial."

In *Kimble v. Degenring*, 116 N.J. Law 602, 186 A. 451 (1936), the New Jersey Supreme Court held:

> "A new trial for damages only is, as to that issue, a trial de novo. 'Where a motion for a new trial has been sustained, the case stands as if there had never been a trial; the court has the same power with reference to matters connected with the trial of the case as it had before the first trial was had, and it is the duty of the court to proceed as in the first instance. The new trial is had as if there had never been a previous one.' 46 C.J. 461. See, also, 20 R.C.L. 323. Thus in the case at bar it was the duty of the trial court and jury to consider the matter of damages as though it were never before raised."

The court further said:

> "It would indeed be shocking to one's sense of justice if, for example, plaintiff suffered an injury to a limb and the jury was obliged to estimate the ultimate result of that injury, and a new trial was subsequently granted, that he would not be permitted to have the jury take into account, in assessing damages, the fact that the limb had to be amputated as a result of the alleged injury." 186 A. at 452.

To the same effect is *Chappell v. Pennsylvania & West Virginia Railway Company*, 402 Pa. 646, 168 A.2d 330 (1961).

(B) To What Date Should Damages Be Calculated?

Plaintiffs' evidence presented at the second trial calculated the damages from September 1, 1964, the sale of the Oldsmobile franchise, to December 1974, a date just prior to the commencement of the retrial on the issue of damages. Defendant, on the other hand, contends that plaintiff should not have been allowed to prove damages extending beyond the date of beginning of the first trial, viz.: April 17, 1972. Objections to the introduction of evidence showing damages up to the date of the second trial were overruled. The court received this evidence and now again rules in plaintiffs' favor on this issue.

Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), would allow recovery of all damages to the date of trial, as well as such damages as might arise in the future provided that they are not so speculative as to be unprovable.

> "On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative

or their amount and nature unprovable. [Citations omitted.]

• • • • •

"In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." 401 U.S. at 339, 91 S.Ct. at 806, 28 L.Ed.2d at 92.

In other words, in antitrust cases the reason for limiting damages to the date of trial is that the future is too speculative, but when we have a retrial like this, we know what has happened in the past up to the date in the second trial and the objection of speculativeness no longer applies. Assuming that the Automobile Dealers' Act is a supplement to the antitrust laws, see 15 U.S.C. § 1224 and *Buono Sales, Inc. v. Chrysler Motors Corp.*, 499 F.2d 715 (3d Cir. 1971), the same rationale should apply to an action by an automobile dealer who has been wronged by a violation of the Automobile Dealers' Act as to other sections of the antitrust laws, i.e., damages recoverable should be limited to the date of the trial, whether first or second, and not allowed for any date beyond that as too speculative. Thus we find no merit in defendant's argument that damages must be limited to the date of the first trial. Plaintiff is entitled to recover any provable damages, present or future. The plaintiffs have in fact, made their calculation to show damages until December 1974, a date just prior to trial, by projecting lost profits from September 1964 until that date. We find no error in that method of calculation insofar as the period used is concerned.

(C) To Whom Are Damages Payable?

The next question to be determined before damages can be computed is which of the plaintiffs, Edward C. Rea

or 22 Ford, Inc., is entitled to recover the damages. The outcome of this issue will solve certain subsidiary questions as whether the damages should be computed before or after corporate income taxes and whether Rea's salary should be deducted as a business expense prior to the computation of profits.

The parties have stipulated that plaintiff, Edward C. Rea (Rea), was the sole owner of all outstanding shares of stock of Rea Oldsmobile, Inc. (Rea Olds) on August 31, 1964, and that Albert D. Rea, plaintiff's brother, owned no shares of Rea Olds prior to that date. Rea Olds changed its name to 22 Ford, Inc. on September 6, 1964. Albert D. Rea first obtained stock of 22 Ford, Inc., formerly known as Edward C. Rea, Inc., on April 1, 1965. Presently, it is further stipulated, Albert D. Rea owns 79 shares, or 13 per cent, of 22 Ford, Inc. and Edward C. Rea owns the remaining 527 outstanding shares.

We held previously that this cause of action was transferred from Edward C. Rea, Inc. to 22 Ford in the dealership agreement of April, 1966. *Rea v. Ford Motor Co.*, 355 F.Supp. 842, at 862-3. Edward C. Rea, Inc. was wholly owned by Edward C. Rea and said corporation was dissolved in March, 1965, and all of its assets transferred to 22 Ford, Inc. (See N.T. 6-7.) As to whether or not a cause of action existed under the Automobile Dealers' Act where the injury complained of was not directly to 22 Ford but to Rea and through him to Rea Olds in causing him to surrender the Oldsmobile franchise, the Third Circuit said the following:

"... Nevertheless, we find Ford's argument on this point does not justify its contention that it is entitled to judgment on this claim, for it is based on too narrow and technical an interpretation of who the 'dealer' is under the facts of this case. Edward C. Rea was not only a signing party to the franchise agreement between Ford

and Edward C. Rea, Inc., but was made essential to the operation of the dealership by its terms, which recited that Ford had entered into the agreement 'in reliance (i) upon the representation and agreement that . . . [Edward C. Rea] substantially participate(s) in the ownership of the Dealer . . . and (ii) upon the representation and agreement that . . . [Edward C. Rea] shall have full managerial authority for the operating management of the Dealer in the performance of this agreement.' Rea, therefore, had a cause of action under the Automobile Dealers' Act against Ford for any bad faith in coercing him, as President and principal stockholder of Rea Olds, to surrender the Oldsmobile franchise and to recover damages suffered by Rea Olds as a result of such surrender. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 790-791 (5th Cir. 1971); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965)." 497 F.2d at 584.

In a footnote at the end of that passage, the Third Circuit states:

> "We note that Albert D. Rea, the minority stockholder in Edward C. Rea, Inc., although also made essential to the operation of that dealership by the terms of the franchise agreement, is not named as a party to this case. The district court on remand should determine whether Albert D. Rea should be joined as a party under F.R. Civ. P 19-21 and whether the damages to which Edward C. Rea is entitled by virtue of his percentage of stock ownership should be diminished. See *Coman v. Coman*, 492 F.2d 273 (3d Cir. 1974)." 497 F.2d at 584.

The clear implication of the Circuit's language is that any right of recovery in this action lies with Edward C. Rea, who as president and principal shareholder was made essential to the operation of the Ford franchise, and who was wronged by Ford's action in forcing him to surrender the

Oldsmobile franchise.[1] Rea Olds does not, and never did, have a right to recover. The Third Circuit would also have allowed Albert D. Rea to recover his damages, if joinder were proper, as he too was made essential to the operation of the franchise by the franchise agreement. Albert D. Rea did not seek joinder as a party, however, and as we have noted, the parties have stipulated that Albert D. Rea owned no stock in Rea Olds. Albert Rea has also disclaimed any interest in the damages. Any judgment recoverable in this action will therefore be payable to Edward C. Rea.

Vincel v. White Motor Co., 521 F.2d 1113 (2d Cir. 1975), which held that the cause of action under the Automobile Dealers' Act belonged to the corporation and not to the owner of 100% of the stock, is not controlling. The generally established principle appears to be that when a business is incorporated and suffers injury from an antitrust violation, the locus of the right of action is in the corporation, not the owners or officers of the corporation. An exception to that principle, however, was made in *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965), where the defendant Ford Motor Company owned all of the voting stock of the franchise and controlled the board of directors. To deny Kavanaugh the right to sue would have negated the protective purposes of the Act, as Ford Motor Company obviously would not have been interested in suing itself. Also, in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971), the shareholders were

[1] Although Ford asserts that it was not their policy to require dealers to disavow themselves of all other competing franchises. Ford is bound by the jury's determination of liability. The jury found, in answer to Special Interrogatory No. 5, that the defendant Ford breach "its duty to act in good faith in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers' Act". Implicit in this finding is the determination that one of Ford's agents required Rea to dispose of his Oldsmobile franchise.

permitted to intervene where they had been made essential to the operation of the dealership under the franchise agreement. The case at bar appears to create a unique factual situation in that the violation of the Dealers' Act occurred, not by wrongful termination of the dealer's franchise agreement with the manufacturer, but by requiring the dealer to surrender a separate franchise from a competitor. Edward C. Rea, Inc. is not entitled to damages because it never held the Oldsmobile franchise. In any event, we are bound by the Third Circuit's decision in this matter which has established the law of the case. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967).

Having determined that the judgment in this case should be in favor of Edward C. Rea personally, we need not, of course, be concerned with whether or not it will be subject to Federal Income Tax nor with the amount of tax. However, the measure of damages, as always, is that amount which would put the plaintiff in the same position as if no wrong had occurred. This would be measured here as the amount Rea would have received as salary plus the amount of profits of his business Rea Olds. Ultimately, the profits would belong to Rea, whether he received them as dividends or through dissolution or liquidation of the business. However, these business profits not paid to him in the form of salary would of necessity be subject to corporate income taxes. These taxes, like any other expense, must be deducted in any allowance of damages to Rea.

We note also the recent Third Circuit case of *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (1975). The court held that in computing damages using projected figures, the salary of the principal shareholder, which is properly deductible as a business expense, should be figured into the calculations, thus reducing corporate net earnings. Our holding in the present matter in no way conflicts with

Coleman. That case involved a cause of action by the corporation, who as we discussed above, is the usual party to have standing to bring the action. In the case at bar, the cause of action is Edward C. Rea's, and damages will be computed to award him reasonable compensation in the form of salary plus lost corporate profits, after the deduction of taxes and other business expenses including his salary.

(D) Calculation of Damages.

The defendant Ford Motor Company has sought during this trial to introduce further evidence that Rea Olds' liquidation was necessary in order to supply capital for the operation of the Ford dealership. The court has sustained objections to this evidence on the grounds that the order of the Circuit is clear that all we are to try again is the question of damages and that the question of liability has been settled by the verdict of the jury and the decision of the Circuit upholding it.[2] Whether this evidence comes in under the label of "proximate cause of damages" or under an attempt to retry liability, it is the holding of the court that it is inadmissible. If certain of the defendant's arguments were followed, the amount of recovery would be zero or less. This cannot be permitted in view of the jury's finding that Ford did not exercise good faith in pressuring Rea to surrender the Oldsmobile franchise. The Circuit has directed a retrial because the jury's award "failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company [it has now been agreed that the total of these items is $160,934] were thereafter devoted to the operation of the Monroeville Ford franchise". The Circuit pointed out that the jury's award in the original trial was based upon a straight line projection of Rea Olds' estimated profits from September 1964 to the date

[2]The Circuit said: "... we have concluded that defendant is not entitled to either the entry of judgment in its favor or a new trial to determine the question of liability on this claim."

of trial, May 1972. We have previously held in this opinion that the time for recovery of lost profits, as a measure of damages sustained by the forced sale of the Oldsmobile franchise, should be extended to the end of 1974, immediately before retrial.

It should be further observed that in a case such as this the jury (and the court as the trier of facts) is permitted to make a just and reasonable estimate based on all the reasonable data available. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 at 264, 66 S.Ct. 574, 90 L.Ed 652 (1946). Damages are not to be refused because of uncertainty as to their amount where the uncertainty was caused by the wrongful act of the defendant, in this case forcing Rea to get rid of his Oldsmobile franchise. The court is allowed great leeway in assessing damages in such case. One guideline is what a typical juror would award. *Salomon v. Crown Life Ins. Co.*, 399 F.Supp. 93 (E.D.Mo. 1975); *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (8th Cir. 1968).

The court has further considered the ruling of our Circuit in *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), that an inflationary factor is not to be allowed as to *future* loss of earnings. In this case there is no attempt to obtain damages following the date of trial. We are dealing only with the past and we know how things have gone in the automobile industry during this period of time. Until the end of 1973, profits and salaries have increased but so also have the expenses of operating a dealership. We therefore hold that allowance for inflationary factors should be considered, but these factors are taken into consideration in allowing Rea Olds its historical percentage of sales for the various years and the profitability of such sales figured on the basis of the Private Transportation Index. To allow anything more would be to assume too much that is speculative and for which there is no basis on the record. In calculating the

productive return on the $160,934 which came into 22 Ford as a result of the sale of Rea Olds, we find that a reasonable return—or the expense which would have been incurred by Rea in order to obtain this amount of capital during this period of time—was the prime rate of interest plus ¾ per cent for an amount, as determined by plantiff's expert Staelin, of $177,940 the benefit received by 22 Ford in retaining cash and assets available for the operation of the new Ford franchise plus the original $160,934 or a total of $338,874.[3]

In calculating total profits which would have been realized by Rea Olds, we have made no allowance for the possibility of termination of the franchise by Oldsmobile since the evidence is, and we so find, that Oldsmobile franchises are usually renewed with a good dealer. All the evidence indicates that Edward C. Rea was highly regarded as a good dealer, and the testimony is, according to Carey of the Pittsburgh National Bank, that he was regarded as a good credit risk.

In calculating the total sales there is some discrepancy. Staelin has a figure of .00943% of national Oldsmobile sales whereas Geisel says the figure is .00809%. We accept Geisel's figures rather than Staelin's finding them to be more correct, based upon a three-year period.

The court further holds that no interest should be allowed. This is an unliquidated claim with the amount not capable of ascertainment by mathematical calculation alone at any period of time. The court agrees with the defendant's

[3]"However, the jury's award here failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise. To award 22 Ford recovery of anticipated profits from the Oldsmobile franchise without any duduction for the asset sale or for the fact that it benefited by having the retained cash and assets available for the operation of the new Ford franchise is to permit a double recovery." 497 F.2d 577 at 587.

expert witnesses Gallagher and Geisel that to allow interest would lead to double recovery.

Allowance of all of plaintiffs' claimed items would introduce internal inconsistencies as to the proper theory of recovery. To paraphrase an old proverb, it would allow Rea to have his profits and spend them too. While the inflation factor might account for the actual increase in the cost of goods sold, and so forth, allowing interest on these lost profits would assume, in effect, that the dealership would have had the earnings and invested them, or at least used them to reduce interest costs (on buildings, inventory and so forth). Nevertheless, the mere assumption that Rea Olds would have always sold its historical percentage of national Oldsmobile sales allows for internal growth and expansion.

In other words, the statistical data of plaintiffs assumes a continually increasing number of new car sales until 1974 but does not assume increases in capital, personnel, advertising, and so forth, except insofar as this is accounted for in the profitability formula as expounded by defendant. Defendant's Exhibit 17. Yet, though the plaintiff assumes ever-increasing sales and profits, he does not assume, apparently, that the profits would be reinvested in the business to provide the capital for handling the expanded business. For this reason, plaintiffs' projections, which include both inflation and interest, overstate damages.

It would seem that a simple measure of damages would be the fair market value of what the Rea Olds franchise was worth on September 16, 1964, versus what Rea received for it by way of cash and the assets he retained. The court notes that unlike many Automoblie Dealers' Act cases in which plaintiff loses money for several years (or in which profits are at a minimal level) and other cases in which the plaintiff goes bankrupt and loses his capital investment, in the present case, the plaintiff sold his Oldsmobile business and received

money for it. If this were not a forced sale, we would assume that the plaintiff received the fair market value for his business and thus incurred no loss. Considering the pressures on Rea to sell, it would appear that the sale could have been at a loss and Rea should be entitled to recover that loss. Neither party, however, offered evidence to show the damages in this manner. Instead, plaintiff has elected to claim only loss of anticipated profits. See *Gustafson v. G. M. A. C.*, 470 F.2d 1057 (8th Cir. 1973) cited by the Third Circuit herein.

We allow no further inflationary factors on Rea's salary and bonus since this is allowed in the profit figures to which the Private Transportation Index has been applied to determine profits before taxes. We find this to be sufficient allowance for inflationary factors in this most difficult calculation. The court determines that in a case such as this the Private Transportation Index is more applicable since the consumer Price Index is more concerned with consumable purchases.

Our calculation (see Appendix A) therefore proceeds to take the car sales for each year as calculated in Defendant's Exhibit 16 giving an estimated profit as shown in Defendant's Exhibit 18 before salary and bonus. Salary at $18,000 per annum and bonus at 25 per cent are then deducted giving estimated profit before taxes as shown in Defendant's Exhibit 18 and 19. This is then increased by multiplying it by the Private Transportation Price Index based on 1964=100 resulting in Current Dollar Pre Tax Profits.

Pennsylvania Tax and United States Income Tax are then calculated and deducted as shown in Defendant's Exhibit 20 resulting in the figures for after Tax Profits for each year, a total of $207,663. To this is added the total of salary and bonuses, $267,866 giving a grand total of $475,509 gross losses. From this deduction is made of $338,874, the

amount of benefit received from sale of Rea Olds including rate of return calculated as set forth above. This gives us net damages of $136,635 for which a judgment will be entered.

The foregoing memorandum opinion contains the court's findings of fact and conclusions of law in accordance with Rule 52(a).

APPENDIX A

	Car Sales (DX 16)[1]	Profits Before Taxes and Owner's Salary and Bonus (DX 18)	Edward C. Rea's Salary and Bonus[2]		Corporate Profits After Bonuses & Salary and Before Taxes (DX 19-Col. 4)	After Tax Profits (DX 20-Col. 5)
1964[3]	—		—		—	—
1965	493	$52,784	$18,000 + 25% =	$ 26,696	$26,529	$ 19,451
1966	470	52,096	18,000 + 25% =	26,524	26,329	19,304
1967	446	51,377	18,000 + 25% =	26,344	26,435	19,176
1968	505	53,144	18,000 + 25% =	26,786	28,667	19,734
1969	520	53,593	18,000 + 25% =	26,898	30,021	19,619
1970	374	49,222	18,000 + 25% =	26,076	27,472	18,724
1971	540	54,192	18,000 + 25% =	27,048	33,422	21,794
1972	590	55,689	18,000 + 25% =	27,423	35,072	22,640
1973	654	57,605	18,000 + 25% =	27,901	38,110	24,137
1974	420	50,599	18,000 + 25% =	26,150	35,241	23,084
				$267,846		$207,663

Salary and bonuses	+267,846
Gross Damages	$475,509
Deduct benefit of $160,934 invested in business (see p. 14 of memorandum)	-338,874
Net damages	$136,635

[1].0809% of national sales.
[2]Salary $18,000
Bonuses 25% of Pre Tax Profits after deduction of salary.
[3]1964 is disregarded because of small amounts involved and disputes over certain deductions and allocations.

JUDGMENT ORDER

And now, to wit, December 18, 1975, after hearing the evidence in this case and considering the arguments and briefs of the parties in accordance with the memorandum opinion filed this date and the calculations therein contained,

It is ordered that judgment be entered in favor of the plaintiff Edward C. Rea and against the defendant Ford Motor Company in the amount of $136,635 representing damages due him under the Automobile Dealers' Day in Court Act (15 U.S.C. §1221 et seq.)

It is further ordered that with respect to the claims of 22 Ford, Inc., judgment be and hereby is entered in favor of the defendant Ford Motor Company.

It is further ordered that since all other claims in this case have been disposed of or withdrawn by the plaintiff that the Clerk of Court enter final judgment in favor of the plaintiff Edward C. Rea and against the defendant Ford Motor Company in the amount of $136,635.

Supreme Court, U. S.
FILED
OCT 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977

No. 77-367

EDWARD C. REA and 22 FORD, INC., a corporation,
Respondents,

v.

FORD MOTOR COMPANY, a corporation,
Petitioner.

Brief For Respondents In Opposition

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-367

EDWARD C. REA and 22 FORD, INC., a corporation,
Respondents,

v.

FORD MOTOR COMPANY, a corporation,
Petitioner.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether this petition should be denied simply because it is out of time since Petitioner asserts three reasons for granting the Writ each of which was decided in the 1974 decision of the Circuit Court of Appeals and respecting each of which Petitioner here did not Petition or Cross-Petition at that time.

ARGUMENT

I. The Writ Should Be Denied Because The Petition Is Out Of Time.

A. Petitioner questions the holding of the Circuit Court of Appeals permitting the individual "person" to recover under the Automobile Dealers' Act "... even though the dealership was conducting business in corporate form." (Petition, p. 9). But this holding by the Circuit Court occurred in 1974, *Edward C. Rea and 22 Ford, Inc. v. Ford Motor Company*, 497 F.2d 577 (3rd Cir. 1974) (Appendix B, pp. 13a-41a) (*Rea I*). Indeed, in *Rea II*, the Circuit Court said, "....our first decision in this case attributed the cause of action to Rea himself." *Edward C. Rea and 22 Ford, Inc. v. Ford Motor Company*, Nos. 76-1982 and 76-1983 (3rd Cir. July 6, 1977) (Appendix A, pp. 1a-12a, 5a)

The issue of whether Rea or 22 Ford had a cause of action under the Automobile Dealers' Act against Ford for damages caused to Rea Olds was carefully analyzed and finally decided by the opinion of the Third Circuit in 1974 ordering a redetermination of damages. The Court held the cause of action to be that of Rea, not 22 Ford, as follows (497 F.2d at 584) *(Rea I)* (Appendix B, pp. 21a-22a):

> The district court held, in response to this argument, that this cause of action was included in the transfer of rights under the dealership agreement to 22 Ford in April 1966 and thus 22 Ford, as the successor to the rights of Edward C. Rea, Inc. under the franchise, was entitled to bring suit and recover damages. *Rea v. Ford Motor Co.*, 355 F. Supp. at 862-63. This analysis, however, does not entirely meet the objection raised by Ford, since it assumes one of the points in issue—whether Edward C. Rea, Inc. could recover for the damages suffered by Rea Olds. Nevertheless, we find Ford's argument on this point does not justify its contention that it is entitled to judgment on this claim, for it is based on too narrow and technical an interpretation of who the "dealer" is under the facts of

this case. Edward C. Rea was not only a signing party to the franchise agreement between Ford and Edward C. Rea, Inc., but was made essential to the operation of the dealership by its terms, which recited that Ford had entered into the agreement "in reliance (i) upon the representation and agreement that ... [Edward C. Rea] substantially participate(s) in the ownership of the Dealer ... and (ii) upon the representation that ... [Edward C. Rea] shall have full managerial authority for the operating management of the Dealer in the performance of his agreement." Rea, therefore, had a cause of action under the Automobile Dealers' Act against Ford for any bad faith in coercing him, as President and principal stockholder of Rea Olds, to surrender the Oldsmobile franchise and to recover damages suffered by Rea Olds as a result of such surrender. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 790-791 (5th Cir. 1971); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). (Petition, Appendix B, pp. 21a-22a)

In *Rea II*, speaking of the *Rea I* decision, the Circuit Court said, "Hence, the damages were properly computed with respect to Rea personally." (Appendix A, p. 5a)

Also, the Petition conveniently neglects the words "person .... operating under the terms of a franchise..." contained in the definition of "automobile dealer" in the statute. In the Ford franchise agreement in this case, Edward C. Rea, as the 1974 opinion stated above, is specifically named as an essential party.

And further, *Vincel v. White Motor Corporation*, 521 F.2d 1113 (2d Cir. 1975), cited by Petitioner* as in conflict

*Petitioner here has made a 180 degree turn in the course of its reasoning. It argued below, at trial, and on the recent appeal that Rea should be paid the damages and not the plaintiff corporation. It now conveniently ignores this previous position. This is patently unjust and absurd. Cf. *Weade v. Dickmann, Wright & Pugh*, 337 U.S. 801 (1949); *Corbin v. Baltimore & Ohio Railroad Co.*, 234 F.2d 78 (6th Cir. 1956).

with *Rea I*, is clearly a different case: Rea was sole shareholder of both simultaneously operating dealerships when the wrongdoing occurred, and he was forced to sell out of one of them, a prosperous business. In *Vincel* there were multiple shareholders quarreling over the remains of a defunct business. They were not specifically named as essential parties to that franchise as was Rea in both franchises involved herein.

B. Secondly, petitioner questions "... the earlier affirmance of liability..." in *Rea I;* again it is petitioning respecting Rea I (1974) not *Rea II* (1977).

The trial from which the appeal was taken related only to the questions of the amount of damages. The jury in the original trial of this action found that Ford had not acted in good faith and awarded damages of $350,000 for the profits lost by the plaintiff due to defendant's conduct. On appeal, the Third Circuit affirmed the jury's findings in all regards except one: The jury's damage calculation did not properly reflect that assets of Rea Olds were retained by 22 Ford, *Rea I*, (Petition Appendix B, pp. 26a-27a).

Despite this holding, defendant attempted to offer evidence at the damage retrial below that Rea Olds would have been required to liquidate in order to supply sufficient capital for the Ford dealership. The District Court properly held this evidence irrelevant. "Whether this evidence comes in under the label of 'proximate cause of damages' or under the attempt to re-try liability, it is the holding of the Court that it is inadmissable." (Petition, Appendix C, p. 55a).

Petitioner asserts that the issue of causation was left open for retrial by the opinion in *Rea I*. It argues that that decision affirmed only the jury finding of bad faith by Ford and that the jury's findings of liability did not include a

finding that defendant was the cause of the damage. This argument is based almost entirely on one sentence in Judge Van Dusen's 1974 opinion:

> However, the issue before the jury was Ford's *good faith* in pressuring Rea to surrender the Oldsmobile franchise [emphasis not supplied]. 497 F.2d at 587.

This sentence occurs in the context of Judge Van Dusen's discussion of defendant's argument that it was denied a fair opportunity at the original trial to present the same evidence which was ruled irrelevant below: evidence showing that Rea Olds would have been required to liquidate its assets in order to provide 22 Ford with sufficient operating capital. In considering this argument, Judge Van Dusen examined the record and found that defendant did in fact introduce evidence at the original trial "that the assets of Rea Olds were Rea's sole source of capital for the operation of the Ford dealership." 497 F.2d at 586. Since the jury had already considered evidence on this issue and awarded damages to plaintiff, the Court found defendant's argument to be unavailing and upheld the jury finding of liability. Thus, when the above-quoted sentence is considered in context, petitioner's argument is seen to be fallacious.

Furthermore, petitioner's argument that the issue of causation was left open by the Circuit Court's earlier decision is almost identical to the argument propounded by the defendant in *Terrell v. Household Goods Carrier's Bureau*, 494 F.2d 16 (5th Cir. 1974). The Fifth Circuit had affirmed a jury finding of liability and remanded for retrial on damages. At the retrial, the jury awarded damages to plaintiff, but defendant argued on appeal of the retrial that causation was not sufficiently proved to allow the damage award to stand. In a carefully reasoned opinion by Circuit Judge Goldberg, the Fifth Circuit decided the law of the

case controlled and "the duty of a lower court to follow what has been decided at an earlier stage of the case comprehends things decided by necessary implication as well as those decided explicitly." 494 F.2d at 19. The Court then held that their earlier decision affirming the original trial court's finding of liability "necessarily encompassed the findings on the legal violation and causation or the fact of damage." 494 F.2d at 21.

Besides obviously being out of time now, this issue in this case is not of sufficient importance for the cognizance of this Court. The question concerns the admission of evidence, a matter which rests squarely within the sound discretion of the trial court. That discretion has been affirmed by the Third Circuit Court of Appeals. Petitioner has not shown that this is an important question of federal law deserving this court's time and attention.

C. Petitioner complains it had no opportunity to defend the Automobile Dealers' Act claim *at the first trial*. Again it is asking review of *Rea I* (1974) not *Rea II* (1977). The Complaint filed in 1967 alleged a cause of action under the Automobile Dealers' Act. This powerful large multinational corporation was at all times represented by counsel. These counsel heard the witness-plaintiff Rea testify *at the first trial* in 1972 about his franchise and that Ford had failed to act in good faith under it. Included in Rea's testimony was evidence that Ford would not permit him to retain the Rea Olds dealership. Rea was one of the earliest witnesses. Days of trial including presentation of defense followed. Ford had every opportunity to rebut this evidence. It is astonishing that Ford's counsel now asks this prestigious Court to review this.

The 6 person jury figured out what was going on:

APPENDIX TO OPINION OF APRIL 26, 1974

in

REA, et al, v. FORD MOTOR COMPANY
(3d Cir. No. 73-1190, at 1670a-1672a)

SPECIAL VERDICT

In accordance with instructions of the court, the jury hereby finds as follows:

• • • • •

(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers' Act?

Answer: "Yes".

If your answer is "yes", what amount of damages do you award plaintiff, 22 Ford, Inc., for this breach of duty?

Answer: "$350,000.00."

• • • • •

(Signed by the Jury.)

May 25, 1972.

(Petition, pp. 38a-39a).

RESPONDENTS' REQUEST FOR COSTS

This petition is based on grounds that are obviously frivolous. Petitioner is making an argument to this Court for the first time in all this litigation contrary to that it had repeatedly made below — an argument which if correct could increase Petitioner's damages! Petitioner is not seeking any correct rule of law, but merely wishes to prolong the litigation with consequent additional expenses to Respondents.* Respondents therefore respectfully request this Court to order that petitioner pay respondents' costs in responding to this petition.

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*For this Court to do other than this suggestion would be disastrously expensive for this single garage keeper Respondent pitted against the resources of one of the very largest corporations in the world. This respondent cannot afford further proceedings.

This Complaint was filed March 6, 1967. This David is weary and this Goliath is clearly not.

Plaintiffs were wrongfully treated. A statute of the United States Congress was violated by the Defendant. *Rea v. Ford Motor Company*, 497 F.2d 577 (1974). Sometime, somewhere, there must an end—an award to make restitution.

A few years ago this court said:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

Basic antitrust prosecution and enforcement are of course carried on by the Department of Justice Antitrust Division and the Federal Trade Commission. But government enforcement is inevitably selective, and is subject to political and budgetary variations. The private action is available to any injured business whether the government has shown interest in the particular matter or not. One former Assistant Attorney General in charge of the Antitrust Division has asserted that, as between governmental enforcement and that of private parties, private relief is both more desirable and more effective. Statement by Lee Loevinger, *Hearings Before the Subcom. on the Study of Monopoly Power of the Senate Select Comm. on Small Business*, 85th Cong., 2d Sess., at 7 (1958).

It is enormously discouraging and dispiriting to those who bring the private action, not only to recover their damages, but also to vindicate the

(continued)

fair observance of the free market—the free enterprise economic and political system—to endlessly expend their resources in trial and appeal and remand and rehearing and appeal *ad infinitum*.

Further expense to the original plaintiffs here would impose an awesome burden upon them to vindicate their clear statutory claim. This would serve only to discourage other "private attorneys general", thereby enabling violators to profit and escape penalty for their unlawful acts. This litigation is now in its tenth year and has been marked by enormous cash expenditures just to keep going.

II. CONCLUSION

All of the issues above were presented by the original decision of the Circuit Court of Appeals in *Real I* (1974) and it would be inappropriate for the Court to consider them at this late date. Also, on the unique facts of this case, the decision of the Third Circuit is entirely appropriate. For the reasons given, the Petition for a Writ of Certiorari should be denied and Respondents awarded their costs.

Respectfully submitted,

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Dated October 7, 1977